(29,200)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 650.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, APPELLANT,

vs.

LOUISIANA PUBLIC SERVICE COMMISSION, JOHN M. PARKER, GOVERNOR OF THE STATE OF LOUISIANA; A. V. COCO, ATTORNEY GENERAL OF THE STATE OF LOUISIANA, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

VOLUME III.

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1272½ UNITED STATES OF AMERICA:

Supreme Court of the United States, Washington, D. C.

No. —.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Appellant,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als., Appellees.

VOLUME III.

1273 *Opinion.*

Filed Jul. 24, 1922.

In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et al., Defendants.

Application for Interlocutory Injunction under Section 266 of the Judicial Code.

Hunt Chipley, E. D. Smith, J. C. Henriques and J. Blanc Monroe for Plaintiff.

A. C. Coco, Attorney General, Wylie M. Barrow, Asst. Attorney General, Huey P. Long and A. H. Roberts for Defendants.

Before Bryan, Circuit Judge, and Clayton and Foster, District Judges.

BRYAN, *Circuit Judge:*

The plaintiff, Cumberland Telephone & Telegraph Company, by its bill in equity seeks to enjoin an enforcement of the following order entered by the Louisiana Public Service Commission, May 13, 1922:

"It is ordered, and a rehearing is granted in this case on and from the order of the Railroad Commission of Louisiana of February 26th, 1921, and on the rate allowances made in said order or made in said order of April 1st, 1921, or allowed to be collected in said order of April 1st, 1921, and pending the final hearing and determination of this case, from and after this date, all rate advances allowed on February 26th, 1921, and thereafter, are hereby suspended and the rates and charges to be made and to be collected by the Cumberland Telephone & Telegraph Company within the State of Louisiana will be such as were in force prior to the 26th day of February, 1921, and at the time this application was filed; and be it further:

Ordered, That the various interested parties be given notice that a final hearing of this matter will be held in the City of New Orleans, beginning on the 27th day of June, 1922, at which time all interested parties will be heard."

In September, 1920, the plaintiff applied to the Commis-
1274 sion for an increase in telephone exchange rates over those established by the Postmaster General during Federal control. After hearings, and on February 26, 1921, the Commission entered an order granting the increased rates prayed for by the plaintiff.

April 1, 1921, the Commission entered an order somewhat modifying the rates, reopening its proceedings with reference thereto, and providing for the taking of further testimony. Such was the status of plaintiff's application for increased rates when the Commission issued its order of May 13, 1922, above set out, granting a rehearing, reinstating the rates put into effect during Federal control, and setting the whole matter down for final hearing on June 27, 1922.

The plaintiff's property was returned to it by the Postmaster General August 1, 1919.

The bill contains the following averments:

That upon its total actual average investment, including both interstate and intrastate exchange and toll business, the plaintiff earned 5.92 per cent net revenue for the year ending July 31, 1920, and at the rate of 3.03 per cent per annum during the months of August, September, October and November, 1920;

That for the year 1921, the plaintiff operated under the rates established by the Postmaster General during the months of January and February, and under the increased rates authorized by the Commission's order of February 26, 1921, during the remaining ten months of that year, and earned a net revenue of 7.15 per cent upon its average investment, including both interstate and intrastate business;

That all of plaintiff's telephone exchange business in Louisiana is intrastate, but that its toll business is partly intrastate and partly interstate;

That approximately 89 per cent of plaintiff's total property is used in exclusively in intrastate business, and approximately 11 per cent exclusively in interstate toll business;

That the reasonable value of plaintiff's property in Louisiana de-

voted to both interstate and intrastate business as May 13, 1922, the date of filing the bill, was in excess of $15,000,000;

1275 That for the year 1921 the average investment in exchange lines equipment was $7,993,207.60, in toll lines $3,326,013.12, and that plaintiff's total average investment was $12,942,281.61, which included also land, buildings, supplies and working capital. That for the same year the operating revenues were: from exchange service, $3,540,440.51, from toll service $1,553,853.29, and from miscellaneous sources $77,668.33, a total of $5,171,962.13. That the total operating costs were $4,246,635.08, and the net revenue $924,327.85;

That the rates are confiscatory, and if enforced would deprive plaintiff of its property without due process of law.

The averment that plaintiff's total property exceeds $15,000,000 in value is attempted to be supported by an affidavit to that effect, but it appears that the affidavit itself is based upon an estimate. No actual valuation has as yet been made.

In its answer the Commission alleges that the value of plaintiff's entire property in Louisiana is not in excess of $9,324,212.00, which was the value placed upon it by plaintiff for taxation in 1920, and that the property devoted to intrastate exchange service is of less value.

In considering this application, weight should be given to the fact that the Commission has not issued its final order. It had set an early date for a final hearing before application for injunction was made.

The rates fixed by the Commission are presumed to be just and reasonable. The burden is upon the plaintiff to show that they are unjust, unreasonable or confiscatory. Railroad Commission of Louisiana v. Cumberland Telephone & Telegraph Company, 212 U. S. 414. If it be assumed that the same rates were unreasonably low in 1920, it does not follow that they would be so at this time. There has been a recession of prices, and current rates upon invested capital are lower now than they were in 1920. And of these facts we may take judicial notice. Galveston Electric Company v. City of Galveston, — U. S. —, decided April 10, 1922. Under these circumstances, we do not think the fact that the Commission granted an order in February, 1921, increasing rates is sufficient to take away the presumption of reasonableness from the order of May 13, 1922, suspending the increased rates and re-establishing the old

1276 rates pending final decision. The rates complained of have not been subjected to a practical test and shown to be unremunerative under present conditions.

The plaintiff is entitled to a fair return upon the value of the property used and useful in conducting its telephone business. City of Houston v. Southwestern Bell Telephone Company — U. S. —, decided May 29, 1922.

In order to determine what is a reasonable return it is essential to know the value of the property devoted to the business under consideration. This application for injunction is limited to tele-

phone exchange rates which are alleged to be exclusively intrastate. Of course, there is intrastate toll service also, but no complaint is made as to toll rates. In considering intrastate rates the value of property used in intrastate business should be considered separately, and not in connection with the value of property used in interstate business. The Minnesota Rate Cases, 230 U. S. 352.

The estimate of $15,000,000, placed by plaintiff upon the value of its property as a basis for determining the reasonableness of the rates involved includes interstate business. That estimate includes approximately $1,400,000 of capital invested during the year 1922. The additional new capital doubtless produced additional revenue, but how much is not shown or even estimated. The value of the intrastate exchange property and facilities alleged to be devoted to intrastate service is not anywhere shown by the bill or supporting affidavits. The estimate that 89 per cent of the total value of plaintiff's property is devoted to intrastate service, including intrastate toll service, and that 11 per cent is devoted to interstate toll service, is not a satisfactory basis on which to conclude that rates for the intrastate exchange service are confiscatory. But, upon that basis, if there be deducted from the total average investment for 1921 of $12,942,281.61, the investment in toll lines of $3,326,013.12, and all other investment items be charged to exchange line equipment, the investment value of exchange line equipment for that year could not possibly exceed $8,616,268.48. The operating revenue derived
1277 was upward of $3,500,000. No separate or satisfactory showing is made of the operating cost.

The Commission contends that there should be other large deductions from the capital invested and from the operating costs, but is is not considered necessary to pass upon these contentions of the Commission, for the reason that the case as made by the plaintiff does not, in our opinion, sustain a right to the relief sought.

There is no separation of values, revenues, costs of operation, or earnings, either as between interstate and intrastate business, or as between intrastate exchange and toll business.

The plaintiff was put upon notice by the order of April 1, 1921, by which the question of the reasonableness of its rates was reopened for further investigation, that the rates might be reduced again, and that the order of February 26, 1921, was temporary in its nature. The burden, therefore, remained upon the plaintiff, as the moving party, to separate not only its interstate from its intrastate telephone business, but also its intrastate exchange business from its intrastate toll business, and to show by facts, and not by estimates, that the rates attacked were not sufficient to enable it to earn a fair return upon the value of its intrastate exchange business. Before the rates authorized by rate making bodies are interfered with by the Courts, the evidence ought to be clear and convincing that the rates attacked are inadequate.

We are of opinion that the showing thus far made by plaintiff is insufficient, and the application for interlocutory injunction is, therefore,

Denied.

Foster, District Judge, dissents.

1278 *Decree Denying Application for Preliminary Injunction.*

Filed Jul. 24, 1922.

In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

vs.

LOUISIANA PUBLIC SERVICE COMMISSION et al., Defendants.

Order.

This cause coming on to be heard before the undersigned upon an application by complainant for an interlocutory injunction; and upon consideration thereof, Bryan, Circuit Judge, and Clayton, District Judge, being of the opinion that said application should be denied, and Foster, District Judge, being of the opinion that said application should be granted upon proper injunction bond being furnished;

It is thereupon Ordered, Adjudged and Decreed that said application for interlocutory injunction be and the same hereby is denied

(Signed) NATHAN P. BRYAN,
Circuit Judge.

(Signed) H. D. CLAYTON,
District Judge.

(Signed) RUFUS E. FOSTER,
District Judge.

1279 *Petition for Appeal.*

Filed Jul. 24, 1922.

In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als., Defendants.

Petition.

To the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana:

Now comes Cumberland Telephone & Telegraph Company, plaintiff herein, through undersigned counsel, and shows that heretofore a restraining order was granted to it in this cause on its application and that thereafter its application as plaintiff for an interlocutory injunction was referred by the Honorable Rufus E. Foster, United States District Judge for the Eastern District of Louisiana, to a special tribunal composed of the Honorable Nathan P. Bryan, United States Circuit Judge for the Fifth Judicial Circuit, the Honorable Henry D. Clayton, United States District Judge for the Northern and Middle District of Alabama and the Honorable Rufus E. Foster, United States Judge for the Eastern District of Louisiana, and after due notice said application for a temporary injunction against the defendants came on to be heard on the 23rd day of June, 1922, before said special tribunal, and on the 24th day of July, 1922, the said application for a temporary injunction was denied. Judges Bryan and Clayton concurring in said denial and Judge Foster dissenting.

Plaintiff, Cumberland Telephone & Telegraph Company, feeling aggreived by the said decree refusing the said preliminary injunction hereby prays that an appeal may be allowed to it from the judgment and decree aforesaid rendered by the said special tribunal to the Supreme Court of the United States, because said injunction was not granted as prayed for by plaintiff, Cumberland Telephone & Telegraph Company, and plaintiff submits herewith its assignments of error and prays for a reversal of said judgment and decree and prays that a writ of injunction be granted in accordance with the prayers of plaintiff's petition and for such further relief as may be proper.

1280 Plaintiff further shows that if a supersedeas be not granted herein and if an order be not entered herein continuing in

effect the restraining order heretofore issued and thereby maintaining the status quo until the Supreme Court of the United States shall have passed upon the appeal, irreparable injury will accrue to it and it will otherwise be without remedy in the premises.

Plaintiff shows that the order of the Louisiana Public Service Commission enjoined by the restraining order is an order reducing plaintiff's exchange rates to its more than seventy-four thousand (74,000) telephone subscribers in the State of Louisiana, the reduction in rates being a comparatively trifling sum to each subscriber, but a large amount in the aggregate, and plaintiff shows that if said order is not continued in suspense during the pendency of the appeal herein by the granting of a supersedeas and the issuance of an order continuing in effect the restraining order heretofore issued, it will be impossible for it in case of ultimate success on this appeal to ever collect from its multitudinous and widely scattered subscribers the comparatively small sums, which together make up the large sum of money which constitutes the difference between the rates presently in effect and the rates ordered to be put into effect by the defendants' enjoined order, and that this loss will therefore be an irreparable and irremediable one to it; that on the other hand if a supersedeas is allowed and an order is entered continuing in effect the restraining order heretofore issued upon the giving by plaintiff of a proper bond, no one will or can be injured or will or can suffer loss.

Wherefore, petitioner prays:

(1) That an appeal may be allowed to it herein from the judgment and decree entered herein on the 24 day of July, 1922, and herein above complained of.

(2) That an order of supersedeas may be entered herein pending the final disposition of the cause.

(3) That an order may be entered continuing in effect the restraining order heretofore issued herein under date May 13, 1922, the said supersedeas and the said order continuing in effect the restraining order dated May 13, 1922, to be conditioned upon the giving by plaintiff of a bond or bonds upon such terms and for such amounts as this Court may determine to be just and proper, and petitioner prays that a transcript of the record, proceedings
1281 and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States at Washington, D. C.

And for such other and further orders as may be necessary in the premises and for general relief.

(Signed) J. BLANC MONROE,
" J. C. HENRIQUES,
Solicitors for Plaintiff.

(Sgd.) HUNT CHIPLEY,
" E. D. SMITH,
Of Counsel.

1282 *Assignment of Errors.*

Filed Jul. 24, 1922.

In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als., Defendants.

Assignment of Errors on Appeal.

And now comes Cumberland Telephone & Telegraph Company, Plaintiff herein and says that the judgment and decree rendered in this case by the special tribunal composed of the Honorable N. P. Bryan, Honorable D. Clayton and the Honorable Rufus E. Foster on the 24 day of July, 1922 Foster J. dissenting in this case is erroneous and against the just rights of said plaintiff for the following reasons, which are assigned as errors and as a part of their appeal upon which it will rely in the prosecution of this appeal, to wit:

(1) Because the bill and accompanying documents affirmatively showed without successful contradiction that the telephone rates fixed by the order of the Louisiana Public Service Commission which was under attack to wit, Order No. 40, were unreasonably low, and, that plaintiff's property is being confiscated in violation of the Fourteenth Amendment of the Constitution of the United States and moreover showed a diversity of citizenship between the plaintiff and the defendants, and showed that the rates fixed by said order were unjust, unreasonable and in violation of the constitution and statutes of the State of Louisiana and showed that under the Constitution of Louisiana the right was affirmatively given to plaintiff and similar corporations to bring a suit in a Court of competent jurisdiction and obtain a preliminary injunction enjoining the enforcement of a rate order entered under such circumstances and because under each and all of these circumstances, the Court has failed to grant to plaintiff upon proper request such a preliminary injunction.

(2) The Court erred in failing to grant the preliminary injunction prayed for because the bill and exhibits attached, showed without successful contradiction that the legal stage of the rate-making had passed and that the judicial stage had been reached and
1283 showed that the rate-order complained of what unjust and unreasonable and was confiscatory, and under such circumstances plaintiff was entitled to a preliminary injunction under the

provisions of the Constitution and laws of the United States and the Constitution and laws of Louisiana.

(3) The Court erred in failing to issue said preliminary injunction because the rate-order complained of was unreasonable, unjust and confiscatory and because the Constitution of the State of Louisiana specifically provides for the issuance of such a preliminary injunction under such circumstances and specifically provides that the suit for such an injunction must be filed within ninety (90) days from the date of the Commission's order and not thereafter.

(4) The Court erred in failing to grant the preliminary injunction prayed for because the rate-order attacked was unjust, unreasonable, and confiscatory and because the preliminary injunction sought was merely a preliminary injunction seeking to maintain a status, and to continue in force a schedule of rates which had been continuously in force for a period of more than one year prior to the date of the hearing, and sought the continuance of such a status conditioned upon the giving of a bond by the plaintiff to protect the defendants and to protect the plaintiff's subscribers from loss or damage, the necessary result of which was that had the preliminary injunction been issued finally been found to have been improvidently issued no one would have suffered, whereas the failure to issue such preliminary injunction will constitute an irreparable and irremediable injury to plaintiff in case it should finally prevail in this litigation.

(5) The Court erred in failing to issue said preliminary injunction in that the bill and the exhibits attached to the bill showed without successful contradiction that the rates sought to be put into effect by the order of the Louisiana Public Service Commission attacked were such as would fail to yield to plaintiff a just and reasonable return upon the fair and reasonable value of the property used and useful in the rendition of the service rendered for said rates and said order was, therefore, an unreasonable, unjust and confiscatory order and one against which plaintiff was entitled to a preliminary injunction both under the Constitution and laws of the State of Louisiana and under the Constitution and laws of the United States of America.

(6) The Court erred in failing to issue such preliminary injunction for the reason that the bill and the exhibits showed without successful contradiction that the Louisiana Public Service Commission in formulating its Order No. 40 which was attacked as being arbitrary unreasonable and unjust, refused to allow to plaintiff as proper expenses, certain entirely valid expenses, to wit:

1284

(1) A payment made to the American Telephone & Telegraph Company under plaintiff's contract with said company, which payment and which contract have been expressly approved by the Supreme Court of the United States in the matter of the City

of Houston vs. Southwestern Bell Telephone Company #— U. S. Page —.

(2) An item of depreciation expense calculated in accordance with the orders and directions of the Interstate Commerce Commission promulgated in accordance with law.

(3) An item of expense amounting to over $500,000.00, arbitrarily disallowed by said Louisiana Public Service Commission because of misconception on the part of the Commission.

(7) That the rates promulgated by said Order No. 40 were predicated upon the disallowance of the foregoing proper and reasonable expense allowances, and the said rates were, therefore, unreasonable, unjust and confiscatory and in violation of plaintiff's rights under the Constitution and laws of the United States and of the State of Louisiana, and for these reasons the said prelimi- injunction should have been issued as prayed for.

(8) The Court erred in failing to issue said preliminary injunction for the reason that the bill and the exhibits attached thereto, showed without contradiction that the Louisiana Public Service Commission in issuing its Order No. 40 had deliberately disregarded the evidence of property values, earnings, expenses of the plaintiff as of the date of the inquiry and had predicated all of its findings upon alleged valuations, income and net revenue of the plaintiff at a period approximately twenty-two months prior to the date of the inquiry, and by so doing had promulgated a schedule of rates which was unjust, unreasonable and confiscatory, in that it failed to yield to plaintiff a just and reasonable return upon the fair and reasonable value of its property used and useful in the rendition of service at the date of the inquiry.

1285 (10) The Court erred in failing to issue said preliminary injunction for the reason that it attached to the order of the Louisiana Public Service Commission a presumption of reasonableness, whereas the bill and exhibits attached thereto showed without successful contradiction that the said order was entitled to no such presumption for all or any one of the following reasons:

1. The action of the Louisiana Public Service Commission was deliberately predicated upon figures twenty-two months old, although that Commission at the time it rendered its order had before it later figures and figures as of the date of the inquiry and order.

2. For the reason that the Commission itself before rendering said order has handed down its orders of February 26, 1921, and April 1, 1921, wherein it reached a diametrically opposite conclusion, said opposite conclusion being predicated upon the later figures.

3. The order of the Commission was passed by the affirmative vote of a Commissioner who had pledged himself unconditionally as a condition of election, to the reduction of telephone rates.

4. The order was rendered after a so-called hearing, which was not a real hearing and which did not afford to plaintiff equal protection of the law or due process of law in that plaintiff was precluded from offering any evidence, save affidavits at said hearing, which affidavits the Commission in its order entirely disregarded and which it must necessarily have disregarded in order to arrive at the conclusion expressed in the order attacked.

(11) The Court erred in failing to issue said preliminary injunction for the reason that whereas the bill, Paragraph XXI, distinctly averred:

"That the value of plaintiff's property within the State of Louisiana used and useful in furnishing exclusively intrastate telephone service in the State of Louisiana at this time is in excess of $15,000,000.00"

and whereas, said averment was supported by Hoxsey's affidavit, Page 44, Yundt's affidavit, page 24, Brown's affidavit, pages 21 and 22 and McTiernan's affidavit, page 19, and was no where successfully contradicted, the Court, apparently through a misapprehension stated in its opinion and predicated its findings on the fact that the $15,000,000.00 included property used and useful in interstate, as well as in intrastate service.

(12) The Court erred in failing to issue said preliminary injunction for the reason that in arriving at its conclusion to deny said injunction, it gave weight to the fact that the Louisiana Public Service Commission had not issued its final order, whereas the jurisprudence is that a public service corporation is as much entitled during the period of rate making as at any other time to a rate which will yield to it a fair and reasonable return upon the fair value of its
1286 property used and useful in the rendition of the service, and is as much entitled to an injunction suspending a rate which fails to yield such a return during that period as during any other period.

(13) The Court erred in failing to issue said preliminary injunction for the reason that the bill and exhibits showed that the rate sought to be applied was unreasonable and confiscatory and failed to yield to plaintiff a fair and reasonable return upon the fair value of its property used and useful in the rendition of the service, and plaintiff was entitled to have the Court consider the allegations made in the bill and supported by the uncontradicted affidavits and to pass its own independent judgment upon the same and not be bound by findings of the Commission, and had the Court passed its independent judgment upon the facts averred in the bill and affidavits, plaintiff must necessarily have secured its injunction.

14. The Court erred in failing to issue said preliminary injunction in that while the Court itself held:

If it be assumed that the same rates were unreasonably low in 1920, it does not follow that they would be so at this time."

it failed to take into account the fact that the entire reasoning and conclusion of the Louisiana Public Service Commission was predicated upon figures for the year 1920, although the later figures showing conclusively that the rates were unreasonable and confiscatory were before it and before the Court.

(15) The Court erred in failing to issue said preliminary injunction in that to some extent it predicated its refusal to issue same on the statement.

"There has been a recession of prices, and current rates upon invested capial are lower now than they were in 1920. And of these facts we may take judicial notice."

Whereas, plaintiff's application was supported by the uncontradicted affidavits of Messrs. John E. Bouden, Jr., Page 11, Jas. P. Butler, Page 115, L. M. Pool, page 119, and Eli T. Watson, page 123, four disinterested bank presidents and brokers, who swore positively that the fair rate of return upon capital invested in this locality under similar circumstances at the time of the filing of the bill was 8%; and whereas, the uncontradicted affidavits of Messrs. Hoxsey, page —, and Yundt, page — showed that there had not been and could not be expected to be a recession in the prices of plaintiff's labor and showed that a recession in the prices of material used in the
1287 actual operation of a telephone plant was so small a factor as to be negligible.

(16) The Court erred in failing to issue said preliminary injunction for the reason given that:

"The rates complained of have not been subjected to a practical test and shown to be unremunerative under present conditions."

Since the bill and supporting affidavits showed without contradiction that the rates complained of had actually been in effect for the period August, September, October and November, 1920, at which time they had been demonstrated to be confiscatory and showed that a higher rate which had been actually in effect for the year 1921 had yielded only a return of 6.17% upon the investment, and would have yielded a return of only 3.06 had the rates complained of been applied, so that an ample test of the rates complained of had actually been made, and moreover the Court fell into error in holding a test of any kind essential under the circumstances set forth in the bill and affidavits.

(17) The Court erred in failing to issue said preliminary injunction because it held that there had been no final and actual separation of values, revenues, costs of operation or earnings either between interstate and intrastate business, or as between intrastate exchange and toll business, whereas, the bill and the affidavits gave to the Court all of the data available, which date was more than sufficient to show that no separation made on any basis would show a return on the intrastate exchange property which under the rates

attacked was so low as to be unreasonable and confiscatory; and whereas, the bill and affidavits affirmatively charged that the rates attacked would yield an unreasonably low and confiscatory return to it upon the property used and useful in the rendition of the service; and whereas, no such detailed segregation and showing was, or could be required of a plaintiff upon application for a preliminary injunction.

(18) The Court erred in failing to issue said preliminary injunction for the reason that in considering whether it should or should not issue same, it considered only investment figures and did not consider the fair and reasonable value at the time of the inquiry of the property used and useful in the rendition of the service, whereas had said latter value been considered, it would more conclusively have appeared that the rates sought to be enjoined were not only unreasonable, but were confiscatory.

1288 Wherefore, the said plaintiff prays that the said decree may be reversed and that the said Court be directed to enter a preliminary restraining order in accordance with the prayer in the bill submitted for plaintiff.

(Signed) J. C. HENRIQUES,
" J. BLANC MONROE,
Solicitors for Plaintiff.

(Signed) HUNT CHIPELY,
" E. D. SMITH,
Of Counsel.

1289 *Order Granting Appeal.*

Filed Jul. 24, 1922.

In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als., Defendants.

Order.

This cause came on to be heard on this the 24 day of July, 1922, upon petition of the plaintiff, Cumberland Telephone & Telegraph Company, for an appeal to the Supreme Court of the United States from the decree of the special tribunal to which it was submitted, day the 23 day of June, 1922, denying the injunction prayed for by

plaintiff against the defendants and each of them, their officers, employees, agents and representatives, and all persons whomsoever acting for or on their behalf, to restrain them from enforcing or attempting to enforce the rates and charges fixed by Order No. 40 of the Louisiana Public Service Commission, which is the subject of attack in the bill of complaint herein and the Court having seen and considered the assignments of error exhibited with the petition for appeal,

It is ordered that an appeal be and the same is hereby granted to the Supreme Court of the United States from the judgment and decree aforesaid.

It is further ordered that supersedeas be granted to plaintiff as prayed for upon plaintiff making bond in the sum of One Hundred Thousand Dollars, with good and sufficient surety, conditioned that plaintiff in error shall prosecute its appeal to effect and shall answer all damages and costs if it fails to make its plea good. Said bond shall be conditioned also for the repayment to defendants of such damages as they may suffer and for the repayment to plaintiff's subscribers, and to each of them, of the excess charges collected from each of said subscribers as a result of the issuance and continuance of the preliminary restraining order issued herein, over and above what would have been collected from said subscribers had said
1290 restraining order not been rendered, the said repayment to be made as, when and if it shall have been finally determined herein that the order of the Louisiana Public Service Commission of May 13, 1922, is a legal order binding upon the plaintiff herein.

It is further ordered that the original restraining order of date May 13, 1922, be continued in force until this appeal can be determined, the order herein operating as a supersedeas and maintaining the status.

It is further ordered that the Clerk of the United States District Court for the Eastern District of Louisiana, without delay, make and transmit to the Clerk of the Supreme Court of the United States a full and true transcript of the proceedings in said cause, including the bill of complaint, the answers filed by the defendants, together with the evidence and affidavits filed herein, the restraining order, the bond therefor, the opinion of the special tribunal denying the injunction, the assignments of error, the petition of appeal, the order granting the appeal and the bond provided by the order of the Court this 24 day of July, 1922.

(Signed) RUFUS E. FOSTER,
Judge United States District Court for the Eastern District of Louisiana.

1291 *Appeal Bond.*

Jul. 24, 1922.

In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als., Defendants.

Supersedeas Bond.

Know all men by these presents that we, Cumberland Telephone & Telegraph Company, as principal, and Union Indemnity Company, of New Orleans, Louisiana, a corporation duly authorized to make bonds in the courts of the United States as surety, are held and firmly bound unto Louisiana Public Service Commission, Shelby Taylor, Huey P. Long, Francis Williams, A. V. Coco, Attorney General of Louisiana and Wyley M. Barrow, Assistant Attorney General of Louisiana, and the other defendants herein, in the full and just sum of One hundred thousand and 00/100 dollars, to be paid to the said obligees, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of July, 1922.

Whereas, lately on the 24th day of July, 1922, a special tribunal under Section 266 of the United States Judicial Code composed of the Honorable Nathan P. Bryan, United States Circuit Judge for the Fifth Judicial Circuit, the Honorable Henry D. Clayton, United States District Judge for the Northern and Middle District of Alabama and the Honorable Rufus E. Foster, United States District Judge for the Eastern District of Louisiana, in a matter pending before it for a temporary injunction on the application of the said Cumberland Telephone & Telegraph Company, wherein the Louisiana Public Service Commission, Shelby Taylor, Huey P. Long, Francis Williams, A. V. Coco, Attorney General of Louisiana, and Wyley M. Barrow, Assistant Attorney General of Louisiana, were defendants, judgment was rendered and an order made denying the preliminary injunction against the said defendants; and the said principal, to-wit,

1292 Cumberland Telephone and Telegraph Company, having obtained an allowance of appeal to the Supreme Court of the United States to reverse said judgment and order in the aforesaid suit, which is pending in the United States District Court for the Eastern District of Louisiana, and on said appeal a supersedeas hav-

ing been granted plaintiff Cumberland Telephone & Telegraph Company conditioned that it give bond with good and sufficient security in the sum of One Hundred Thousand Dollars, that appellant shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good said bond to be conditioned also for the repayment to the defendants of such damages as they may suffer and for the repayment to plaintiff's subscribers, and to each of them, of the excess charges collected from each of said subscribers as a result of the preliminary restraining order issued herein and its continuance, over and above what would have been collected from said subscribers had this order not been rendered, said repayment to be made as, when and if it shall have been finally determined herein that the order of the Louisiana Public Service Commission of date May 13, 1922, is a legal order binding upon plaintiff herein.

Whereas, citations have been issued directed to said defendants admonishing them to be and appear before the Supreme Court of the United States at the City of Washington in the District of Columbia thirty days from and after the date of said application;

Now, the condition of the obligation is such that if the Cumberland Telephone & Telegraph Company shall prosecute said appeal to effect and pay all costs, if it shall fail to make said plea good and comply with the terms hereinabove set forth and with the terms of the order of supersedeas, then said obligation to be void, otherwise to remain in full force and effect.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

(Signed) By C. A. STAIR,
Principal.

UNION INDEMNITY COMPANY,
Surety,

(Signed) By T. E. SPRAGUE,
Agent of Att'y-in-fact.

Approved:
(Sgd) RUFUS E. FOSTER,
U. S. District Judge.

Filed in the Clerk's Office July 24, 1922.
(Signed) H. J. CARTER,
Clerk.

1293 *Motion of Defendants to Set Aside Order Granting Supersedeas Pending Appeal and Order to Show Cause.*

Filed July 26, 1922.

United States District Court, Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als., Defendants.

Now into court come Huey P. Long, Shelby Taylor, and Francis Williams, as members of the Louisiana Public Service Commission, and the Louisiana Public Service Commission, herein represented by its chairman and counsel, Huey P. Long, and its attorney, W. M. Barrow, and the State of Louisiana, herein appearing through A. V. Coco, Attorney General, and Wylie M. Barrow, Assistant Attorney General, and moves that this Honorable Court annul and vacate that part of the order, signed herein on the 24th day of July, 1922, wherein and by which the restraining order of date May 13th, 1922, is purported to be continued in effect until appeal taken to the Supreme Court of the United States can be determined; further moves that your Honorable Court vacate and annul that part of the said order of the 24th day of July, 1922, purporting to grant a supersedeas, and to maintain the status of continuing in effect the restraining order issued against your movers on the said 13th day of May, 1922.

Your orators show that the said order of the 24th day of July, 1922, which is hereto specifically referred to and made part hereof by reference, and a copy of the same is hereby attached to this motion and made a part hereof, cannot continue in effect the restraining order issued on the 13th day of May, 1922, for the reason that Section 266 of the Judicial Code and laws and Constitution of the United States provide that no order, rule or regulation of State Board or Commission can be restrained under a restraining order issued preliminarily, except and until a hearing and determination of the motion to grant a preliminary injunction, and

1294 under the authority of the 208 Federal, at page 35, your movers show that a restraining order, ipso facto, falls and becomes ineffective with the rendition of a decree of three judges, either denying or granting an application for a preliminary injunction, and particularly does the said restraining order fall and become non-operative to prevent the future effect of an order

of the Louisiana Public Service Commission when the application for a preliminary injunction has been denied.

Your movers further show that the bond, herein required and furnished, does not act as a stay, and that your Honorable Court was without jurisdiction to continue in effect the restraining order of May 13th, 1922.

Your movers further show that your Honorable Court, composed of only one judge, cannot continue in effect the restraining order of May 13, 1922, pending appeal, and cannot revive, reinstate, or otherwide make operative the restraining order of May 13, 1922, after the denying of a preliminary injunction by three judges, for the reason that the same is beyond the judicial power and jurisdiction of the Court and the same is in direct violation of the Judicial Code of the United States, and the attempt to continue in effect such restraining order and to grant a supercedeas pending an appeal is ab initio null, void and without effect.

Wherefore, movers respectfully pray that your Honorable Court vacate, annul and set aside that part of the orders of July 24th, 1922, of which a copy is hereby attached and made part hereof, wherein the said order purports to continue in effect the restraining order of May 13th, 1922, and wherein the said order purports to grant a supersedeas and to maintain the status of the said restraining order of May 13th, 1922, pending appeal, and its determination to the Supreme Court of the United States.

Pray for service, process, and all and general relief, judgment according to equity and rules of this Honorable Court.

(Signed) HUEY P. LONG,
" SHELBY TAYLOR,
" FRANCIS WILLIAMS,
" LOUISIANA PUBLIC SERVICE COMMISSION,
" By HUEY P. LONG,
Chairman and Counsel.
" W. M. BARROW,
Attorney.
" STATE OF LOUISIANA,
" A. V. COCO,
Attorney General.
" GEORGE SETH GUION,
Assistant Attorney General.
" A. V. COCO,
Attorney General.
" W. M. BARROW,
Assistant Attorney General.

1295 *Order.*

Considering the above and foregoing motion,

It is ordered, that the plaintiff, Cumberland Telephone and Telegraph Company, do show cause at 11 A. M., on the 27 day of July, 1922, why that part of the order of July 24th, 1922, continuing in

effect the restraining order of May 13, 1922, and granting a supersedeas to maintain the status of the said restraining order of the 13th day of May, 1922, should not be vacated, annulled, cancelled and set aside.

This the 26 day of July, 1922.

(Signed) RUFUS E. FOSTER,
Judge United States District Court for the Eastern District of Louisiana.

1296 *Reasons for Denying Motion to Set Aside Supersedeas.*

Filed Jul. 27, 1922.

United States District Court, Eastern District of Louisiana (Baton Rouge Division).

No. 95.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY
vs.
LOUISIANA PUBLIC SERVICE COMMISSION.

Opinion of the Court.

When we get away from the popular aspect of this case, and the political aspect—I mean political in the sense that the State of Louisiana, or any other state, is always offended in its dignity when an order of one of its administrative boards is enjoined—it is a very easy matter to settle this question on legal principles.

There is nothing new in this paragraph of the Judicial Code, saying that a restraining order should only run until the hearing on the case. That has been the equity jurisprudence from time immemorial, and, in fact, under the equity rules, a restraining order is not supposed to exist for more than ten days, and, if we take the provision of that paragraph, it really extends the power of the restraining order, because it permits it to run until there is a hearing on the case, Congress undoubtedly realizing that these extraordinary three-judge tribunals cannot be gotten together at all times within ten days.

Now Congress certainly never intended, when they granted an appeal to the Supreme Court, that the litigant should have the shadow and not the substance of the appeal, and it never intended that the burdens should be put on the Supreme Court of deciding a mere money judgment. It intended that the Supreme Court should pass upon the great underlying principles of rate making. Now, if this was a money judgment, if we considered this a money judgment in favor of the subscribers, why then the Company would be entitled to a supersedeas as a matter of right and not as a matter of discretion in the Court.

Now let us go a little further. Here is a question submitted to three judges, let us say. This is not the action of an individual judge. The question of supersedeas was a matter of discussion among the court composed of Judge Bryan, Judge Clayton and myself, and I showed you, Mr. Long, Judge Bryan's letter, in which he says that he thought that the Cumberland Telephone Company would be entitled to a supersedeas in this case, but that was a matter to be taken up by the District Court, by myself.

1297 Now, when I granted an appeal with supersedeas, that is the action of the Court, it is merely a matter of practice that I signed the order. Now that supersedeas ought always to be granted to prevent irreparable injury. The order of the Commission does not establish the fact that the old rates are right or that they are wrong, and the arm of the State of Louisiana is not stayed in any way by this injunction. The Public Service Commission has a perfect right to go ahead to-morrow and have a hearing, to establish what ought to be the correct rates for the Telephone Company to charge, and this injunction does not interfere with that in the slightest. All that this injunction does is to prohibit the reduction of rates already granted by the Public Service Commission until such time as the appeal is heard, or until such time as the Public Service Commission has a hearing on the case and puts in a new schedule of rates. Now the Public Service Commission is not even held up until the Supreme Court has passed on this injunction; if they went ahead to-morrow and fixed new rates, why this whole matter would fall, it would become a moot case. So that there was no occasion for anyone to become very much exercised over this.

Now, then, let us see what the result would be. There is no question that if the old rates went into effect, if there was no supersedeas, that the Cumberland Telephone Company would suffer irreparable injury. They could never recover from the subscribers, practically or legally, the difference between the old rates that they would be entitled to charge, if they are right in their application, and the rates that would be put in effect by the order of the Commission.

Now, on the other hand, there is no possible way for subscribers to lose one dollar. They have a bond, and let us concede that that bond may not be sufficient—it probably would not be sufficient—to pay any rebates out of the bond itelf, but the Company is perfectly solvent. It contends that it has over $15,000,000 of property in the State of Louisiana, and if we cut that in half—I don't think the contention of the Public Service Commission is that it is below $6,000,000—let us say $6,000,000—certainly the subscribers can recover out of that any overplus that they have paid.

1298 Now it will not be necessary for the subscribers to enter suit. This Court has ample power, when the case is returned to it, as it would have to be returned to it, to order the Cumberland Telephone Company to make these rebates to its subscribers, it would not be necessary for them to come into Court.

Now, further than that, they have been ordered by the Commission, in the original order, to so keep their books that they could make these rebates on a final settlement of the case. I presume that

has been done. Even though it was not done by special order, it is a very simple matter to look at the accounts of the subscribers, whether they are charged up with four or five or ten dollars, or whatever the prices may be on exchange rates, and deduct from that the dollar or dollar and a half or whatever the reduction may be eventually.

Now the case does not touch the toll rates that have been paid in cash. It only affects exchange rates that are collected monthly from rendered bills, and I am quite sure it would be an absolute abuse of discretion on my part, and entirely unfair and unjust to the litigant, if I did not grant supersedeas in this case. Now that question is one which, in the judgment of the three judges who sat on this case, is addressed to the discretion of the District Court. So I will deny the motion to set aside the supersedeas.

1299 *Decree Denying Motion of Defendants to Set Aside Order Granting Supersedeas Appeal.*

Filed July 27, 1922.

Baton Rouge Division, United States District Court, Eastern District of Louisiana.

No. 95.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als.

This cause came on this day to be heard upon the motion of the defendants to set aside that part of the order herein entered by this Court on July 24th, 1922, granting a supersedeas pending the appeal herein, and continuing in effect the restraining order of May 13, 1922, and maint-ining the statuts, and was argued by counsel for the respective parties;

Whereupon, and on due consideration thereof, and for the reasons this day filed;

It is ordered by the Court that the said motion of defendants filed in this cause July 26, 1922, be, and the same is hereby denied.

(Signed) RUFUS E. FOSTER,
Judge.

New Orleans, La., July 27th, 1922.

1300 *Complainants' Præcipe.*

Filed Jul. 25, 1922.

In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,
vs.
LOUISIANA PUBLIC SERVICE COMMISSION et als., Defendants.

Præcipe.

To the Clerk of the United States District Court for the Eastern District of Louisiana:

Please prepare a transcript of record in the said case on appeal to the Supreme Court of the United States, containing the following items:

1. The bill of complaint and exhibits attached thereto.

2. The answer of defendants.

3. The motion to dismiss the bill.

4. The restraining order.

5. The bond given in connection with the restraining order.

6. The order of reference to the three Judges.

7. Plaintiff's affidavits introduced at the hearing and exhibits attached thereto.

8. Certificate of Henry Jastremski, dated June 10, 1922, marked (20).

9. The affidavits of defendants (not including exhibits except such as defendants may specially request to have included. This because one of said affidavits purports to have as an exhibit the entire record before the Louisiana Commission, consisting of more than 500 pages, mainly irrelevant and another purports to have as an exhibit 384 pages of affidavits filed in another case in another court, together with certain decisions and orders of that court).

10. The opinion of the two Judges denying the temporary injunction.

11. The order of the Special tribunal denying the preliminary injunction and the dissent of Judge Foster.

12. The petition for appeal.

13. The assignments of error.

14. The order granting the appeal and supersedeas and continuing the status quo.

15. The supersedeas and cost bond.

16. The citations of appeal with acknowledgments of service thereon.

17. This præcipe.

18. The Clerk's certificate with certificate of costs.

1301 Hall, Monroe & Lemann.

July 24, 1922.

Messrs. Wyley M. Barrow, Assistant Attorney General; Huey P. Long, Baton Rouge, La.

DEAR SIRS:

United States District Court for the Eastern District of Louisiana.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

vs.

LOUISIANA PUBLIC SERVICE COMMISSION et al., Defendants.

Enclosed please find præcipe for transcript which I am this day filing with the Clerk of the United States District Court for the Eastern District of Louisiana.

I call your especial attention to Article 9 so that if you desire to have any of the exhibits in question incorporated you may avail yourselves of the opportunity afforded you by the law to do so. It seems obvious that you do not wish all of this irrelevant matter in the transcript, hence the instructions to the Clerk included in this præcipe.

Yours very truly,

J. BLANC MONROE.
D.

JBM–D.
encl.
cc. to Harry J. Carter, Esq., Clerk.

1302 *Defendants' Præcipe.*

Filed August 2, 1922.

In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

vs.

LOUISIANA PUBLIC SERVICE COMMISSION et al., Defendants.

To the Clerk of the United States District Court for the Eastern District of Louisiana:

The defendants herein request that the following documents be included in the transcript of record in this case on appeal to the Supreme Court of the United States:

1. The entire record as made up before the Louisiana Public Service Commission and the Railroad Commission of Louisiana, including the transcript of testimony and exhibits, only as shown on attached sheet HPL #1.

2. The affidavit of A. H. Roberts of Nashville, Tennessee. Exhibits as on attached sheet.

3. The affidavit of Mark Wolf.

4. The affidavit of L. F. Sherer.

5. The affidavit of Francis Williams.

6. Certified copy of the record in the case of the Cumberland Telephone & Telegraph Company vs. Railroad and Public Utilities Commission of the State of Tennessee, B. A. Enlae, et al., only as under No. 2.

7. The motion to vacate the order granting the supersedeas and continuing the status quo.

8. The order of the court and opinion denying the motion to vacate the supersedeas.

9. This præcipe.

10. Clerk's certificate and certificate of costs.

LOUISIANA PUBLIC SERVICE COMMISSION,
(Sgd.) By HUEY P. LONG, JR.,
Chairman.
(Signed) HUEY P. LONG,
" W. M. BARROW,
Attorneys for Louisiana Public Service Commission.
STATE OF LOUISIANA,
(Signed) By A. V. COCO
Attorney General.
" W. M. BARROW,
Assistant Attorney General.
(Signed) A. V. COCO.
" W. M. BARROW.

I hereby certify that copy of the foregoing has this day been mailed to J. C. Henriques, Atty. for appellant, under registered cover. This July 2, 1922.
(Signed) HUEY P. LONG,
For Appellees.

1303 Attached Sheet H. P. L. #1.

Commission's Record as follows & in the following order:

1. Petition to the Commission.
2. Testimony Vol. 1, 356 pages heard December 15, 16, 17, 1920.
3. Testimony Vol. 2, 310 pages heard February 24, 25, 26, 1921.
4. Yundt's Exhibits 1 to 12.
5. Hoxsey's Exhibits 1 to 18.
6. McCollum's Exhibits, 2 pages both marked "#1."
7. Sweeney's Exhibits No. 1 to No. 3.
8. King No. 1.
9. Hearsey No. 1 and No. 2.
10. Wolff's Exhibits No. 1 to No. 48.
11. Hoxsey's Exhibits A, 6A, 7A, 7B, 8A, 13A.
12. N. O. Exhibits A & B.
13. Order No. 2,397 R. R. Commission No. 1.
14. Order No. 2,403, R. R. Commission No. 2.
15. La. Public Service Com. Order No. 4, Commission No. 3.
16. Order and notice for hearing in New Orleans on — day of —, 1922.

17. Motion to recuse Com. Williams, Cumberland #1.

18. Exception to form of Procedu*t*r Cumberland No. 2.

19. Affidavit of Chas. A. Stair, Cumberland No. 3.

20. Affidavit of J. J. McTiernan, Cumberland No. 4.

21. Affidavit of Georgee J. Yundt.

22. Reid No. 1, affidavit of Robert A. Reid and attached copy of paper only for stock and bond list; eliminate the remainder.

23. Viosca No. 1.

24. Kittredge #1, affidavit of Maloney & Kittredge.

25. Order and decision of Commission May 13, 1922.

1304 Attached Sheet H. P. L. #2.

Roberts' Exhibits.

Sheet No. 1 to Attach to Roberts' Affidavit.

Eliminate "A."
Exhibit "B."—Give title on front page and copy pages 64 to 176, inclusive and certificate of Clerk of U. S. Court in Tennessee on page attached between pages 176 & 177.
Exhibit "C."—In full.

1305 *Motion & Order Extending Time for Return Day of Transcript of Appeal.*

Filed Aug. 15, 1922.

In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et al., Defendants.

Motion.

On joint motion of Cumberland Telephone & Telegraph Company, plaintiff herein, and Louisiana Public Service Commission et al., defendants herein, and on suggesting to this Honorable Court that the defendants herein have requested by præcipe that there be included in the transcript the entire testimony taken before the

Louisiana Public Service Commission and pages 64 to 176, inclusive, of the testimony taken before the United States District Court for the middle District of Tennessee, No. — in Equity, and the testimony of J. J. McTiernan et als., before the Tennessee Railroad and Public Utilities Commission, which said testimony forms part of the exhibits to the affidavit of A. H. Roberts, and marked Exhibit "C" offered as evidence on the application for preliminary injunction herein.

And on further suggesting that in order to incorporate said testimony it will be necessary that an order be entered enlarging the time within which the transcript of appeal shall be filed in the Supreme Court of the United States herein, as appears from the certificate of the Clerk to that effect attached hereto.

And on further suggesting that inasmuch as the said testimony is merely an exhibit to an affidavit filed in the application for preliminary injunction, same should be taken up as an exhibit and not reduced to narrative form.

1306 (1) It is ordered that the time within which the transcript in this cause shall be returnable to the Supreme Court of the United States is hereby enlarged and extended for a period of sixty (60) additional days from the present expiration date, to-wit: August 22nd, 1922.

(2) It is further ordered that the said testimony, to-wit, all the testimony before the Louisiana Public Service Commission and the testimony before the United States District Court for the Middle District of Tennessee, pages 64 to 176, inclusive, and the testimony of J. J. McTiernan, et als., attached to the affidavit of A. H. Roberts as Exhibit "C," shall be reproduced in the exact words of the witnesses as they appear in the said exhibits and the record of the Louisiana Public Service Commission.

(Signed) RUFUS E. FOSTER,
U. S. District Judge.

New Orleans, La., August 15, 1922.

(Signed) HUNT CHIPLEY,
J. C. HENRIQUES,
J. BLANC MONROE,
Attys. for Plaintiff.
HUEY P. LONG,
For All Defendants.

I, Henry J. Carter, Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify that on July 24, 1922, an appeal was granted to the Supreme Court of the United States to the Complainant, returnable on August 22, 1922, and that I will be unable to complete the transcript of appeal by said return date and that a delay of sixty days from said return day, August 22, 1922, will be necessary in order that said transcript may be completed.

Witness my hand and seal of said Court at the City of New Orleans, La., this 15th day of August, A. D., 1922.

(Signed) H. J. CARTER,
[SEAL.] *Clerk.*

Clerk's Office.

A true copy.
(Signed) H. J. CARTER,
Clerk U. S. District Court,
Eastern District of Louisiana.

New Orleans, La., Aug. 15, 1922.

1307 UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana, Baton Rouge Division.

Clerk's Office.

I, Henry J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing three (3) volumes, containing a total of 1,306 pages, contain and form a full, complete, true and perfect transcript of the record, assignment of errors and proceedings in the case of "Cumberland Telephone & Telegraph Co., versus Louisiana Public Service Commission et al.," No. 95 (In Equity) of the Docket of said Court, as made in accordance with Præcipes for transcript of record, copied therein.

Witness my hand, and seal of the said Court, at New Orleans, Louisiana, on this 14th, day of October, A. D., 1922.

[Seal of U. S. District Court for the Eastern Dist. of La., N. O. Div.]

H. J. CARTER,
Clerk,
By HY. J. LOISEL,
Deputy Clerk.

1308 THE UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana.

The President of the United States to Hon. John M. Parker, Governor of the State of La., Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, D. C., within 30 days from date hereof, pursuant to a petition for appeal with supecedeas and order filed in the Clerk's Office of the District Court of the United States for the Eastern District of Louisiana, wherein Cumberland Telephone & Telegraph Company has lately appealed to the Supreme Court of the United States from a decree lately rendered in the United States District Court for the Eastern District of Louisiana by the special tribunal

composed of the Honorable Nathan P. Bryan, U. S. Circuit Judge for the Fifth Judicial Circuit, the Honorable Henry D. Clayton, U. S. District Judge for the Northern and Middle District of Alabama and the Honorable Rufus E. Foster, U. S. District Judge for the Eastern District of Louisiana denying plaintiff's application for a preliminary injunction to show cause, if any there be, why the judgment rendered against the said Cumberland Telephone & Telegraph Company as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus E. Foster, Judge of the United States District Court, at New Orleans, La., this 24 day of July in the year of our Lord one thousand nine hundred and twenty two.

(Signed) RUFUS E. FOSTER,
Judge.

Clerk's Office.

A true copy.
H. J. CARTER,
Clerk United States District Court,
Eastern District of Louisiana.

New Orleans, La., Jul. 25, 1922.

1309 [Endorsed:] United States District Court, Eastern District of Louisiana, Baton Rouge Division. No. 95. Cumberland Telephone & Telegraph Co., Plaintiff, vs. Louisiana Public Service Commission et als., Defenda-. Copy of Citation of Appeal. Marshal's return. No. —. U. S. District Court, Eastern District of Louisiana, Baton Rouge Division. Filed Jul. 28, 1922. Hy. J. Loisel, Dep. Clerk. Gov. Parker.

Received by U. S. Marshal New Orleans La. July 25/22, and on the 28th day of the same month and year I served the original of which this writ is a certified copy on His Excellency, John M. Parker, Governor of the State of Louisiana by handing same to him in person, in the City of New Orleans, Louisiana.

VICTOR LOISEL,
U. S. Marshal,
By H. C. MOSELEY,
Deputy U. S. Marshal.

1310 In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als., Defendants.

Citation.

The United States of America to A. V. Coco, Attorney General State of Louisiana, Greeting:

Whereas, Cumberland Telephone & Telegraph Company as plaintiff has lately appealed to the Supreme Court of the United States from a decree lately rendered in the United States District Court for the Eastern District of Louisiana by the special tribunal composed of the Honorable Nathan P. Bryan, United States Circuit Judge for the Fifth Judicial Circuit, the Honorable Henry D. Clayton, United States District Judge for the Northern and Middle District- of Alabama, and the Honorable Rufus E. Foster, United States District Judge for the Eastern District of Louisiana, denying plaintiff's application for a preliminary injunction, and the said Cumberland Telephone & Telegraph Company has filed the security required by law and by the order granting to it an appeal with supersedeas and with maintenance of the status quo.

You are, therefore, cited to appear before the said Supreme Court of the United States at the City of Washington on the 22 day of August, 1922, next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of New Orleans in the Fifth Circuit, Eastern District of Louisiana, this 24 day of July in the year of our Lord, one thousand nine hundred and twenty-two.

(Signed) RUFUS E. FOSTER,
Judge of the U. S. District Court for the Eastern District of Louisiana.

Service of a copy of the within citation is hereby admitted this — day of ——, 1922.

—— ——.

1311 & 1312 UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana, New Orleans Division.

Clerk's Office.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand, and the seal of the said Court, at New Orleans, Louisiana, this 25th day of July, A. D. 1922.

[Seal of the U. S. District Court for the Eastern Dist. of La., N. O. Div.]

H. J. CARTER,
Clerk.

Return.

Received by U. S. Marshal, New Orleans, La., July 25/22, and on the 27th day of the same month and year I served copy hereof on A. V. Coco, Attorney General of the State of Louisiana by handing the same to Asst. Atty. General Paul Somperac, in person, in the office of the Attorney General of the State of Louisiana, the Attorney General being absent at the time of said service.

VICTOR LOISEL,
U. S. Marshal,
By H. C. MOSELEY,
Deputy U. S. Marshal.

1313 [Endorsed:] No. 95. U. S. District Court, Eastern District of Louisiana, Baton Rouge Division. Cumberland Telephone & Telegraph Company vs. Louisiana Public Service Commission et als. Copy of Citation. No. —. U. S. District Court, Eastern District of Louisiana, Baton Rouge Division. Filed Jul. 27, 1922. Hy. J. Loisel, Dep. Clerk.

1314 In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als., Defendants.

Citation.

The United States of America to Huey P. Long, Greeting:

Whereas, Cumberland Telephone & Telegraph Company as plaintiff has lately appealed to the Supreme Court of the United States from a decree lately rendered in the United States District Court for the Eastern District of Louisiana by the special tribunal composed of the Honorable Nathan P. Bryan, United States Circuit Judge for the Fifth Judicial Circuit, the Honorable Henry D. Clayton, United States District Judge for the Northern and Middle District of Alabama, and the Honorable Rufus E. Foster, United States District Judge for the Eastern District of Louisiana, denying plaintiff's application for a preliminary injunction, and the said Cumberland Telephone & Telegraph Company has filed the security required by law and by the order granting to it an appeal with supersedeas and with maintenance of the status quo,

You are, therefore, cited to appear before the said Supreme Court of the United States at the City of Washington on the 22 day of August, 1922, next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of New Orleans in the Fifth Circuit, Eastern District of Louisiana, this 24 day of July in the year of our Lord, one thousand nine hundred and twenty-two.

(Signed) RUFUS E. FOSTER,
Judge of the U. S. District Court for the Eastern District of Louisiana.

Service of a copy of the within citation is hereby admitted this — day of ——, 1922.

—— ——.

1315 & 1316 UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana, New Orleans Division.

Clerk's Office.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand, and the seal of the said Court, at New Orleans, Louisiana, this 25th day of July, A. D. 1922.

[Seal of the U. S. District Court for the Eastern Dist. of La., N. O. Div.]

H. J. CARTER,
Clerk.

1317 *Return.*

Received by U. S. Marshal, New Orleans, La., July 25/22, and on the 26th day of the same month and year I served copy hereof on Huey P. Long, member of the Louisiana Public Service Commission by handing the same to him in person, in the City of New Orleans, La.

VICTOR LOISEL,
U. S. Marshal,
By H. C. MOSELEY,
Deputy U. S. Marshal.

[Endorsed:] No. 95. U. S. District Court, Eastern District of Louisiana, Baton Rouge Division. Cumberland Telephone & Telegraph Company vs. Louisiana Public Service Commission et als. Copy of Citation. No. —. U. S. District Court, Eastern District of Louisiana, Baton Rouge Division. Filed Jul. 27, 1922. Hy. J. Loisel, Dep. Clerk.

1318 In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als., Defendants.

Citation.

The United States of America to Louisiana Public Service Commission, Greeting:

Whereas, Cumberland Telephone & Telegraph Company as plaintiff has lately appealed to the Supreme Court of the United States from a decree lately rendered in the United States District Court for the Eastern District of Louisiana by the special tribunal composed of the Honorable Nathan P. Bryan, United States Circuit Judge for the Eastern District of Louisiana by the special tribunal composed of the Honorable Nathan P. Bryan, United States Circuit Judge for the Fifth Judicial Circuit, the Honorable Henry D. Clayton, United States District Judge for the Northern and Middle District of Alabama, and the Honorable Rufus E. Foster, United States District Judge for the Eastern District of Louisiana, denying plaintiff's application for a preliminary injunction, and the said Cumberland Telephone & Telegraph Company has filed the security required by law and by the order granting to it an appeal with supersedeas and with maintenance of the status quo,

You are, therefore, cited to appear before the said Supreme Court of the United States at the City of Washington on the 22 day of August, 1922, next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of New Orleans in the Fifth Circuit, Eastern District of Louisiana, this 24 day of July in the year of our Lord one thousand, nine hundred and twenty-two.

(Signed) RUFUS E. FOSTER,
Judge of the U. S. District Court for the Eastern District of Louisiana.

Service of a copy of the within citation is hereby admitted this — day of ——, 1922.

—— ——.

1319 & 1320 UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana, New Orleans Division.

Clerk's Office.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand, and the seal of the said Court, at New Orleans, Louisiana, this 25th day of July, A. D. 1922.

[Seal of U. S. District Court for the Eastern District of La., N. O. Div.]

H. J. CARTER,
Clerk.

1321 *Return.*

Received by U. S. Marshal, New Orleans, La., July 25/22 and on the 26th day of the same month and year I served copy hereof on the Public Service Commission of Louisiana by Handing the same to the Chairman thereof, Mr. Huey P. Long, in person, in the City of New Orleans, La.

VICTOR LOISEL,
U. S. Marshal,
By H. C. MOSELEY,
Deputy U. S. Marshal.

[Endorsed:] No. 95. U. S. District Court Eastern District of Louisiana, Baton Rouge Division. Cumberland Telephone & Telegraph Company vs. Louisiana Public Service Commission et als. Copy of Citation. No. —. U. S. District Court, Eastern District of Louisiana, Baton Rouge Division. Filed Jul. 27, 1922. Hy. J. Loisel, Dep. Clerk.

1322 In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als., Defendants.

Citation.

The United States of America to Francis Williams, Greeting:

Whereas, Cumberland Telephone & Telegraph Company as plaintiff has lately appealed to the Supreme Court of the United States from a decree lately rendered in the United States District Court for the Eastern District of Louisiana by the special tribunal composed of the Honorable Nathan P. Bryan, United States Circuit Judge for the Fifth Judicial Circuit, the Honorable Henry D. Clayton, United States District Judge for the Northern and Middle District of Alabama, and the Honorable Rufus E. Foster, United States District Judge for the Eastern District of Louisiana, denying plaintiff's application for a preliminary injunction, and the said Cumberland Telephone & Telegraph Company has filed the security required by law and by the order granting to it an appeal with supersedeas and with maintenance of the status quo,

You are, therefore, cited to appear before the said Supreme Court of the United States at the City of Washington on the 22 day of August, 1922, next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of New Orleans in the Fifth Circuit, Eastern District of Louisiana, this 24 day of July in the year of our Lord, one thousand nine hundred and twenty-two.

(Signed) RUFUS E. FOSTER,
Judge of the U. S. District Court for the Eastern District of Louisiana.

Serice of a copy of the within citation is herby admitted this — day of ——, 1922.

—— ——,

1323 & 1324 UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana, New Orleans Division.

Clerk's Office.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand, and the seal of the said Court, at New Orleans, Louisiana, this 25th day of July A. D. 1922.

[Seal of U. S. District Court for the Eastern Dist. of La., N. O. Div.]

H. J. CARTER, *Clerk.*

1325 *Return.*

Received by U. S. Marshal, New Orleans, La., July 25/22, and on the 27th day of the same month and year I served copy hereof on Francis Williams, member of the Public Service Commission of Louisiana by handing the same to him in person in the City of New Orleans, La.

VICTOR LOISEL,
U. S. Marshal,
By H. C. MOSELEY,
Deputy U. S. Marshal.

[Endorsed:] No. 95. U. S. District Court, Eastern District of Louisiana, Baton Rouge Division. Cumberland Telephone & Telegraph Company vs. Louisiana Public Service Commission, et als. Copy of Citation. No. —, U. S. District Court, Eastern District of Louisiana, Baton Rouge Division. Filed Jul. 27, 1922. Hy. J. Loisel, Dep. Clerk.

1326 In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als., Defendants.

Citation.

The United States of America to Shelby Taylor, Greeting:

Whereas, Cumberland Telephone & Telegraph Company as plaintiff has lately appealed to the Supreme Court of the United States

from a decree lately rendered in the United States District Court for the Eastern District of Louisiana by the special tribunal composed of the Honorable Nathan P. Bryan, United States Circuit Judge for the Fifth Judicial Circuit, the Honorable Henry D. Clayton, United States District Judge for the Northern and Middle District of Alabama, and the Honorable Rufus E. Foster, United States District Judge for the Eastern District of Louisiana, denying plaintiff's application for a preliminary injunction, and the said Cumberland Telephone & Telegraph Company has filed the security required by law and by the order granting to it an appeal with supersedeas and with maintenance of the status quo,

You are, therefore, cited to appear before the said Supreme Court of the United States at the City of Washington on the 22 day of August, 1922, next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of New Orleans in the Fifth Circuit, Eastern District of Louisiana, this 24 day of July in the year of our Lord, one thousand, nine hundred and twenty-two.

(Signed) RUFUS E. FOSTER,
Judge of the U. S. District Court for the Eastern District of Louisiana.

Service of a copy of the within citation is hereby admitted this — day of ——, 1922.

——— ———.

1327 & 1328 UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana, New Orleans Division.

Clerk's Office.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand, and the seal of the said Court, at New Orleans, Louisiana, this 25th day of July A. D. 1922.

[Seal of U. S. Distrit Court for the Eastern Dist. of La., No. O. Di.]

H. J. CARTER,
Clerk.

1329 *Return.*

Received by U. S. Marshal, New Orleans, La., July 25/22, and on the 28th day of the same month and year I served copy hereof on Shelby Taylor by leaving same at his office in Baton Rouge, La., in the hands of his clerk Miss Fournette.

VICTOR LOISEL,
U. S. Marshal.

[Endorsed:] No. 95. U. S. District Court, Eastern District of Louisiana, Baton Rouge Division. Cumberland Telephone & Telegraph Company vs. Louisiana Public Service Commission, et als. Copy of Citation. No. —, U. S. District Court, Eastern District of Louisiana, Baton Rouge Division. Filed Jul. 29, 1922. Hy. J. Loisel, Dep. Clerk.

1330 In the United States District Court for the Eastern District of Louisiana, Baton Rouge Division.

In Equity.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION et als., Defendants.

Citation.

The United States of America to Wyley M. Barrow, Assistant Attorney General State of Louisiana, Greeting:

Whereas, Cumberland Telephone & Telegraph Company as plaintiff has lately appealed to the Supreme Court of the United States from a decree lately rendered in the United States District Court for the Eastern District of Louisiana by the special tribunal composed of the Honorable Nathan P. Bryan, United States Circuit Judge for the Fifth Judicial Circuit, the Honorable Henry D. Clayton, United States District Judge for the Northern and Middle District of Alabama, and the Honorable Rufus E. Foster, United States District Judge for the Eastern District of Louisiana, denying plaintiff's application for a preliminary injunction, and the said Cumberland Telephone & Telegraph Company has filed the security required by law and by the order granting to it an appeal with supersedeas and with maintenance of the status quo,

You are, therefore, cited to appear before the said Supreme Court of the United States at the City of Washington on the 22 day of August, 1922, next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of New Orleans in the Fifth Circuit, Eastern District of Louisiana, this 24 day of July in the year of our Lord, one thousand, nine hundred and twenty-two.

(Signed) RUFUS E. FOSTER,
Judge of the U. S. District Court for the Eastern District of Louisiana.

Service of a copy of the within citation is hereby admitted this 27th day of July, 1922.

W. M. BARROW,
Asst. Attorney General.

1331 & 1332 UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana, New Orleans Division.

Clerk's Office.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand, and the seal of the said Court, at New Orleans, Louisiana, this 25th day of July A. D. 1922.

[Seal of U. S. District Court for the Eastern Dist. of La., N. O. Div.]

H. J. CARTER,
Clerk.

1333 *Return.*

Received by U. S. Marshal, New Orleans, La., July 25/22, and on the 27th day of the same month and year I served this writ on Mr. Wiley M. Barrow, Asst. Atty. General, by handing the same to him in person, in New Orleans, Louisiana.

VICTOR LOISEL,
U. S. Marshal,
By H. C. MOSELEY,
Deputy U. S. Marshal.

[Endorsed:] No. 95. U. S. District Court, Eastern District of Louisiana, Baton Rouge Division. Cumberland Telephone & Telegraph Company vs. Louisiana Public Service Commission, et als. Copy of Citation. No. —, U. S. District Court, Eastern District of Louisiana, Baton Rouge Division. Filed Jul. 27, 1922. Hy. J. Loisel, Dep. Clerk.

Endorsed on cover: File No. 29,200. E. Louisiana, D. C. U. S. Term No. 650. Cumberland Telephone & Telegraph Company, appellant, vs. Louisiana Public Service Commission, John M. Parker, Governor of the State of Louisiana, A. V. Coco, Attorney General of the State of Louisiana, et al. Filed October 19th, 1922. File No. 29,200.

FILED
DEC 11 1922
WM. R. STANSB
CLE

THE SUPREME COURT OF THE UNITED STATES

October Term, 1922,

No. 650

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY,
Appellant,

VS.

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
Appellee.

Appeal from the District Court of the United States, Eastern District of Louisiana.

MOTION TO ADVANCE FOR ARGUMENT.

LOUISIANA PUBLIC SERVICE COMMISSION,
By HUEY P. LONG.
W. M. BARROW.
Solicitors.

STATE OF LOUISIANA;
By A. V. COCO,
Attorney General.
W. M. BARROW,
Assistant Attorney General.

Ramires-Jones Printing Company, Baton Rouge, La.

THE SUPREME COURT OF THE UNITED STATES

October Term, 1922,

No. 650

CUMBERLAND TELEPHONE AND
TELEGRAPH COMPANY,
Appellant,

VS.

LOUISIANA PUBLIC SERVICE
COMMISSION, ET AL.,
Appellee.

Appeal from the District Court of the United States,
Eastern District of Louisiana.

MOTION TO ADVANCE FOR ARGUMENT.

Now come the Louisiana Public Service Commission, Huey P. Long, Chairman, Shelby Taylor, and Francis Williams, members thereof, the State of Louisiana, through A. V. Coco, its Attorney General, and Wylie M. Barrow, its Assistant Attorney General, and represent to the Court:

I.

That this is a case in which, upon the filing of the bill of complaint, a temporary restraining order was issued by the Judge

of the United States District Court for the Eastern District of Louisiana.

II.

That in this case the Cumberland Telephone and Telegraph Company, appellant, applied for an interlocutory injunction on the ground that an order entered and adopted by the Louisiana Public Service Commission reducing telephone rates for local exchange service in the State of Louisiana was unconstitutional.

III.

That in accordance with the provisions of Section 266 of the Judicial Code (36 Stats. 1162, as amended by Act of March 4, 1913, c. 160, 37 Stats. 1013; 5 Fed. Stats. Ann. 2d Ed., p. 983, 2 U. S. Comp. Stats. 1916, p. 1143), the application for an interlocutory injunction was heard before a special tribunal composed of Hon. Nathan P. Bryan, circuit judge, and Hon. Henry D. Clayton and Hon. Rufus E. Foster, district judges, upon the bill and answer and affidavits.

IV.

That after hearing argument by counsel and considering briefs, a majority of the said three Federal judges refused the application for an interlocutory injunction.

V.

That immediately after the said three-judge court had refused the application for an interlocutory injunction, the Hon. Rufus E. Foster, Judge of the United States District Court in which the suit was filed, granted an appeal to the Cumberland Tele-

phone and Telegraph Company and ordered that the said appeal should act as a supersedeas, thus restoring, pending the appeal, the temporary restraining order formerly issued.

VI.

An original proceeding was filed in the Supreme Court of the United States by the Louisiana Public Service Commission in the form of a petition for mandamus to set aside the supersedeas and restraining order granted by Judge Foster, which was treated by the court as a motion to vacate the supersedeas to which the petition for mandamus was directed on this appeal. On November 20, 1922, the court, through Mr. Chief Justice Taft, rendered its opinion on the said motion by appellees to set aside the supersedeas and injunction granted by District Judge Foster at the time he allowed an appeal from the order of the three judges who heard the application for a temporary injunction, namely, Circuit Judge Bryan, and District Judges Foster and Clayton, in which the court granted the motion of the appellees to set aside as without jurisdiction the order of injunction granted by Judge Foster and referred to the District Court constituted of the said three judges, the application filed with the Supreme Court for an injunction maintaining the *status quo* for its determination.

VII.

That on November 25, 1922, the said District Court constituted of the said three judges who originally heard the application for injunction, on the application of the Cumberland Telephone & Telegraph Company, appellant, without notice to

the Louisiana Public Service Commission or the State of Louisiana, or any other of the defendants in this cause, issued an order which was subsequently signed and served on November 25, 1922, enjoining and prohibiting the appellees and their agents, officers, attorneys and employees, from enforcing or attempting to enforce, pending the decision on this appeal, the order of the Louisiana Public Service Commission of May 13, 1922, reducing telephone exchange rates in the State of Louisiana.

VIII.

That this case involves the constitutionality of the said order of the Louisiana Public Service Commission, appellee, reducing the said telephone rates within the State of Louisiana, which said order was based on substantial evidence and restored rates which existed prior to February 28, 1921, pending further investigations by the said Louisiana Public Service Commission.

IX.

That this case is one of great public importance, affecting more than seventy thousand telephone subscribers within the State of Louisiana, who are compelled to pay a higher rate for telephone service than has been found reasonable by the Louisiana Public Service Commission pending further proceedings before the said Commission for higher rates.

X.

That the said rates which the said telephone subscribers are now being compelled to pay are higher than those which the said three judge court refused to enjoin.

XI.

That the said Cumberland Telephone & Telegraph Company, appellant, is prosecuting this appeal from the order of the said three judge court denying an interlocutory injunction without reasonable grounds therefor.

WHEREFORE, the Louisiana Public Service Commission, Huey P. Long, Chairman, and Shelby Taylor and Francis Williams, members thereof, defendants and appellees herein, pray this Honorable Court to advance this cause to the summary docket and assign the case for argument by preference at the earliest convenience of the court, and affirm the decree of the said three judge court, denying complainants and appellants an interlocutory injunction, and dismissing the appeal.

Notice hereof has been served upon the solicitors for the Cumberland Telephone and Telegraph Company, appellant.

LOUISIANA PUBLIC SERVICE COMMISSION.
By HUEY P. LONG,
W. M. BARROW,
Solicitors.

STATE OF LOUISIANA.
By A. V. COCO,
Attorney General.
W. M. BARROW,
Assistant Attorney General.

APPENDIX A.

"IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION.

Cumberland Telephone & Telegraph Company,
Plaintiff,

vs. No. 95, In Equity.

Louisiana Public Service Commission, et als.,
Defendants.

ORDER

In this cause, complainant having appealed to the Supreme Court of the United States from an order heretofore entered denying to plaintiff an interlocutory injunction until the final hearing of this cause as prayed for in the bill herein filed, and plaintiff having petitioned the court that pending the said appeal to the Supreme Court of the United States the defendants be enjoined and restrained from enforcing or attempting to enforce the rates and charges fixed in Order No. 40 of the Louisiana Public Service Commission, dated the 13th day of May, 1922, and entered in cause No. R. R. C. of Louisiana No. 3052 L. P. S. C. Case No. 48, entitled: Louisiana Public Service Commission, Cumberland Telephone & Telegraph Company, ex parte, Rate Adjustment, and from putting into effect said order in so far as it fixes and puts in force a schedule of telephone rates to be charged by plaintiff in the State of Louisiana, and from bringing any suit or taking any action or proceeding of any nature or kind whatsoever under said order, or in pursuance thereof, which has for its purpose the enforcement of that part of said order fixing said rates, or from instituting or authorizing or directing any other person or persons to prosecute or institute any suit or suits, action or actions against plaintiff for the recovery of any penalties under or by virtue of any of the provisions of the Constitution of Louisiana by reason of the failure of plaintiff, its officers, agents or servants, or any

of them, to put into effect or charge the rates made effective by reason of said Order No. 40, dated May 13, 1922; and the court being of opinion that the status quo pending the hearing of said appeal and the determination thereof by the Supreme Court of the United States should be preserved.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the defendants, their agents, servants and employees be and they are hereby restrained, pending the hearing and determination of the appeal taken in this cause by complainant and now pending in the Supreme Court of the United States, from enforcing or attempting to enforce the rates and charges fixed in said Order No. 40 of the Louisiana Public Service Commission, dated May 13, 1922, in the above described cause, and from putting into effect said order in so far as it fixes and puts in force a schedule of telephone rates to be charged by plaintiff in the State of Louisiana, and from bringing any suit or taking any action or proceeding of any nature or kind whatsoever, under said order or in pursuance thereof, which has for its purpose the enforcement of that part of said order fixing said rates, or from instituting or authorizing or directing any other person or persons to prosecute or institute any suit or suits, action or actions, against plaintiff for the recovery of any penalties under or by virtue of any of the provisions of the Constitution of Louisiana by reason of the failure of plaintiff and appellant, its officers, agents or servants, or any of them, to put into effect or charge the rates made effective by reason of said Order No. 40, dated May 13, 1922.

IT IS FURTHER ORDERED that the complainant give bond in the sum of One Hundred Thousand ($100,000.00) Dollars, with good and sufficient surety, to be approved by the Judge of the United States District Court for the Eastern District of Louisiana, or the Clerk of said Court, conditioned that appellant shall prosecute its appeal to effect and shall answer all damages and costs, if it fails to make its plea good, said bond to be conditioned also for the repayment to defendants of such

damages as they may suffer and for the repayment to plaintiff's subscribers, and each of them, of the excess charges collected from each of said subscribers as a result of the issuance and continuance of the restraining order issued herein, over and above what would have been collected from said subscribers had said restraining order not been rendered, the said repayment to be made as, when and if it shall have been finally determined herein that the order of the Louisiana P[illegible] Service Commission of May 13, 1922, is a legal order binding upon the plaintiff herein.

Dated this 20th day of November, 1922.

(original signed):

NATHAN P. BRYAN,
Circuit Judge of the 5th Judicial District.

H. D. CLAYTON,
United States District Judge for the Northern and Middle District of Alabama.

RUFUS E. FOSTER,
United States District Judge, Eastern District of Louisiana.

UNITED STATES OF AMERICA

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CLERK'S OFFICE:

I certify the foregoing to be a true copy from the original record in this office.

WITNESS MY HAND, and the seal of the said Court, at New Orleans, Louisiana, this 25th day of November, A. D. 1922.

(Seal)

H. J. CARTER,
Clerk."

OUTLINE AND INDEX OF BRIEF.

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TABLE OF
STATUTES, CASES AND AUTHORITIES.

Section 266 Judicial Code.

Ex Parte Metropolitan Water Co. of West Virginia, 220 U. S., 539, 31 Supreme Court Reporter 600, 55 Law Ed. 575.

Louisville & Nashville Railroad Company v. Railroad Commission of Alabama, 208 Federal Reporter, pp. 56 and 58.

Cumberland Telephone & Telegraph Co. v. Louisville Public Service Commission, addenda to this brief.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 650

CUMBERLAND TELEPHONE & TELEGRAPH CO.,
Appellant,

versus

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
Appellees.

BRIEF OF APPELLEES ON MOTION TO SET ASIDE SUPERSEDEAS AND INJUNCTION GRANTED.

STATEMENT OF THE CASE.

May It Please the Court:

This original proceeding is instituted by Huey P. Long, Shelby Taylor and Francis Williams, who constitute the Louisiana Public Service Commission, who appear in their capacity as members of the said Commission, and in its name.

On the 13th day of May, 1922, the Louisiana Public Service Commission rendered and issued its order, No. 40, to-wit:

> "IT IS ORDERED, and a **rehearing is granted** in this case on and from the order of the Railroad Commission of Louisiana of February 26th, 1921, and on the rate allowances made in said order, or made in said order of April 1st, 1921, or allowed to be collected in said order of April 1st, 1921, and pending the final hearing and determination of this case, from and after this date, all rate advances allowed on February 26th, 1921, and thereafter, are hereby suspended and the rates and charges to be made and to be collected by the Cumberland Telephone & Telegraph Company within the State of Louisiana will be such as were in force prior to the 26th day of February, 1921, and at the time this application was filed; and be it further
>
> "ORDERED, That the various interested parties be given notice that a final hearing of this matter will be held in the City of New Orleans, beginning on the 27th day of June, 1922, at which time all interested parties will be heard.
>
> "BY ORDER OF THE COMMISSION.
>
> "New Orleans, La., May 13th, 1922."

The effect of the order, by granting the said rehearing, was to suspend increases previously allowed by the Commission in the same case in an order which had never become final, pending a final hearing, which was set to be heard at an early date.

On the very day that the Commission rendered its order, No. 40, the Cumberland Telephone & Telegraph Company filed a voluminous petition in the District Court of the United States for the Eastern District of Louisiana, praying for an injunction, and that pending a hearing and decision before three Federal judges, a temporary restraining order issue. The judge of the District Court issued a temporary restraining order on the very day that the Commission handed down its decision and order, and called to his assistance Circuit Judge Nathan P. Bryan and District Judge Henry D. Clayton, who heard argument on the question of an interlocutory injunction on June 23, 1922.

On the 24th day of July, 1922, a majority of the three judges, through the Circuit Judge as the organ of the Court, handed down an opinion holding that no interlocutory injunction was justified and declining to issue the same. Foster, District Judge, dissented. On the same day, however, all three judges signed a decree "that said application for interlocutory injunction be and the same is hereby denied."

Immediately the Cumberland Telephone & Telegraph Company filed application for appeal to the Supreme Court of the United States, and as a result, Foster, District Judge, sitting alone, granted the application of the said Telephone Company, in which order he purported to reinstate the temporary restraining order which he issued on the 13th day of May, 1922, and to grant a supersedeas, so

as to maintain the status of the said restraining order, pending a final decision in the Supreme Court.

On the 26th day of July, 1922, the plaintiffs, acting for the Louisiana Public Service Commission, filed a motion in the District Court for the Eastern District of Louisiana, praying that the Court vacate that part of the order of appeal which continued the status of the restraining order and granted a supersedeas. The motion was duly taken up and heard on July 27, 1922, on which hearing the Court promptly entered an order declining to vacate the supersedeas and the restraining order which he reinstated pending final determination of the case in the Supreme Court of the United States. Thereupon, plaintiffs applied to your Honorable Court for writ of mandamus against the Judge of the District Court for the Eastern District of Louisiana, so as to vacate that part of the appeal order which purported to grant a supersedeas and a continuance of the temporary restraining order issued on May 13, 1922.

SPECIFICATION OF ERRORS.

1. It was error for the District Court to continue in effect or reinstate the temporary restraining order issued on May 13, 1922, after the three judges had signed a decree declining to issue an interlocutory injunction.

2. It was error for the District Court to grant a supersedeas appeal continuing the temporary restraining order issued by a District Judge pending the hearing and determination before the three Federal Judges on the ques-

tion as to whether an interlocutory injunction should or should not issue.

3. The Court erred in attempting to keep alive a temporary restraining order after the enlarged District Court passed upon the question of issuing an interlocutory injunction.

ARGUMENT.

In the year 1913, after a historical debate, in which some of the most capable judicial authorities of the United States participated, Congress of the United States amended the Judicial Code by providing that no interlocutory injunction could issue against a state commission or other administrative board unless the same be done after hearing before three Federal judges, one of whom, the amendment required, must be either a judge of a Circuit Court of Appeal or a justice of the Supreme Court of the United States. Realizing that probabilities might prevent the immediate assembling of the enlarged District Court, Congress permitted that a District Judge could issue a temporary restraining order, if of opinion that irreparable injury would be done in the meantime, but the lawmakers were specific in providing that:

> "Such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid."

The intention of the lawmakers was written into the Judicial Code in such terms as left no room for the con-

struction that the policy of the National Government was committed against interlocutory injunctions constantly frustrating the various remedial and legislative commissions created by the several states, and it was a further recognition of your Honorable Court's safe jurisprudence that a legislative order of a state should be deemed and considered *prima facie* correct until its invalidity be made reasonably certain to more than one judge of an inferior tribunal. In the case now before your Honors one District Judge has granted a temporary restraining order, which, under the terms of Section 266 of the Judicial Code, was to last "only until" that moment when the three Judges either granted or declined to grant an interlocutory injunction. Three judges have met, heard argument, and issued a decree declining to grant an interlocutory injunction, the effect of which was such that the Commission's order was allowed to take effect. But the same District Judge, who could not enjoin the Commission, has issued an order of appeal, in which he has perverted the language and provisions of Section 266 of the Judicial Code by continuing his own restraining order in effect until this case is finally determined in the Supreme Court of the United States. What this District Judge has done is to interpret that the provision that a "temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction, upon notice as aforesaid," should be enlarged so as to mean that in the event he cannot call to his assistance two judges and secure one of those judges to agree with him, that just the

same, he can tie the hands of a State board as firmly as if three judges had granted the interlocutory injunction.

When we were arguing this case in the District Court in New Orleans, we submitted to the Court the proposition that if one judge could continue a temporary restraining order, regardless of whatever the three judges may have decided, that the provisions of Section 266 of the Judicial Code were worthless and of no value toward preventing a District Court from issuing such restraining process as it saw fit. The Court readily agreed that the said section might well have never been written, so far as would prevent a District Judge from tying the hands of a State Commission until the very day that an appeal was finally determined in the Supreme Court of the United States. At one stroke, the District Judge had annulled what had been recognized throughout the length and breadth of the United States, from the very day that the amendment was made to the Judicial Code by the insertion of Section 266. Regardless of the fact that your Honorable Court has as yet failed to pass upon the right of a District Judge to continue a temporary restraining order after a hearing and determination before three Federal judges, we submit that no interpretation by your Honorable Court could be more certain or more simple than the plain provisions of the Code itself, which unmistakably provides that no interlocutory injunction should issue to restrain an order of an administrative board or commission of any state, unless the same shall be heard and determined by three Federal Judges, of whom at least one shall either be a Justice of the

Supreme Court or a Circuit Judge, and unless a majority of said three judges shall concur in granting such application, but that if any justice of the Supreme Court or any Circuit or District Judge be of the opinion that irreparable loss or damge would result to the complainant unless a temporary restraining order is granted, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but "such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction, upon notice" before the three Federal Judges.

When three Federal Judges grant an interlocutory injunction, refuse an interlocutory injunction, or otherwise pass upon the issue of issuing an interlocutory injunction, the temporary restraining order issued by one Justice or Judge has served its day, lived its life and died. It is without the power of any one Justice or Judge to revive or reinstate an order which the lawmaker says can only exist until three judges have passed upon the issuing of an interlocutory injunction.

That your Honorable Court intends that one Judge shall not transcend or go beyond the strict provisions of this section, is well indicated by your decision in the case *Ex Parte Metropolitan Water Co. of West Virginia, 220 U. S., 539, 31 Supreme Court, 600, 55 Law Ed., 575.* In that case a District Judge, acting under the authority conferred by Section 266 of the Judicial Code, granted a temporary re-

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of Sect der. His attention was called to the provisions
made t 66 of the Judicial Code, and a request was
hearing wo other judges should be called to assist in
injunct determining an application for a temporary
of the s The District Judge ruled that the provision
to gran n merely deprived a single judge of the power
be held temporary injunction, and that a Court might
sailed s ne judge for the purpose of decreeing the as-
its enfo te to be constitutional, and refused to enjoin
and at ient. The District Judge, therefore, sat alone,
the tem lose of the hearing, entered a decree vacating
injuncti ry restraining order and denying a temporary
late Chi A very lengthy opinion, delivered through a
power ustice, held that a single judge had only the
the sect sue a temporary restraining order, and that
to vacat did not give such a judge the right or power
ing, befe e temporary restraining order without a hear-
Code, a n enlarged Court, provided for by the Judicial
the Dist as a result, mandamus was issued, compelling
ing orde Judge to vacate his order vacating the restrain-
nd denying the temporary injunction.

In the

that an resent case, the District Judge has contended
the temp eal has been granted from the dissolution of
pressly ary restraining order. That argument is ex-
the lang wered in the above cited case, and we quote
e of the late Chief Justice:

> de he appeal allowed to this Court is from an or-
> in denying, as well as from an order granting, an
> nction. * * * The section made no provi-

sion for an appeal from an order made by a single judge denying an interlocutory injunction, and a right of appeal is not otherwise given by the statute."

If the District Judge and the Cumberland Telephone Company take the position that a supersedeas appeal is granted on the question of the temporary restraining order being vacated, then they are answered in the language of your Honorable Court, that no appeal lies from the action of one District Judge, but only from the action of three Judges. The only function allowed to any one Justice or Judge is the right to issue a temporary restraining order, which dies the day the three Judges decide the main issue, and the fact that the restraining order may be vacated is of no moment, so far as applies to the right of an appeal. We submit that in this case the action of the District Judge in attempting to reinstate or to continue a temporary restraining order that had died by reason of its limitation, was far less warranted in law and in equity than had he sought to vacate an order issued with his own hand. We can see some reason why a Court might have held that the arm which issued the temporary restraining order had the power to cancel it, if it saw fit, but there is no semblance of right or of authority which a reasonable mind can glean from Section 266 of the Judicial Code by which a single judge, clothed with authority to act until the three judges acted, and no more, could act in direct and violative terms to the actions of the majority of the enlarged District Court. We view the action of the District Judge in

this case in the same light as if he had originally declared that the action of the majority of the District Court was erroneous and wrong and that, therefore, he issued the injunction until such a date as the Supreme Court of the United States might decide the contrary. The effect of his action is the same as if he had himself, on his own motion, granted an injunction until such a time as the Supreme Court of the United States might or might not hold that the injunction should have issued on the original trial. Why have a Circuit Judge and a District Judge called to sit with another District Judge, for the sole purpose of determining whether a State should be restrained, pending a decision from the Supreme Court of the United States, if it be within the power of that one Judge to restrain the Commission pending the final decision in the highest Court, regardless of the decision rendered by a majority of the District Court under the Section 266 of the Judicial Code, the very purpose of which and the very terms of which restricted the plenary authority of a single Judge or Justice?

The language of Circuit Judge Shelby and of Circuit Judge Pardee, in the case of *Louisville & Nashville Railroad Co. v. Railroad Commission of Alabama, 208 Federal Reporter, pp. 56 and 58*, aptly and with grammatical exactitude, state the law applicable to this case as follows:

> "Pardee, Circuit Judge. The act of Congress providing for the calling in of two judges in certain applications for temporary injunctions is a restrictive statute, not at all flattering to the intelligence

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impartiality of the District Judges of the coun-
and it does not, in my judgment, call for a lib-
construction, so I am not inclined to broaden
statute to cover a supposed intention of the
maker, but rather disposed to leave the matter
he Supreme Court, and in the meantime hold
the eminent lawyers in the judiciary commit-
f Congress who framed the same meant exactly
t they said and said exactly what they meant.
appreciate the force of Judge Shelby's reason-
n regard to the proper construction to be given
e statute, and under the peculiar circumstances
is case I am not disposed to make any further
in the matter.

This cause coming on to be heard upon the appli-
n of the plaintiff, the Louisville & Nashville
oad Company, for the allowance of an appeal
t to the Supreme Court of the United States
an order of the District Court, composed of
Circuit Judges and a District Judge, denying
etition of the plaintiff for an injunction *pen-*
lite, as prayed for in its supplemental bill in
ause, and upon the application of the plaintiff
supersedeas and an order restraining the en-
ment of an order of the Railroad Commission
abama set out in its supplemental bill.

nd the Court being of opinion that, owing to
tainty as to the proper construction of Sec-
66 of the Judicial Code, with relation to the
ity of the Court to restrain the enforcement
order, pending the appeal, and in view of the
t status of the case, and the pendency of other
that are likely to present the same question
cision, and of the importance of a final and

authoritative decision thereof to the public and the litigants, the application for a supersedeas and for a restraining order would better be presented to the Supreme Court.

"'It is therefore ordered that the plaintiff's application for the allowance of the appeal and for supersedeas or a restraining order against the enforcement of the order of the Railroad Commission of Alabama, pending the appeal, be denied, the Court not passing upon the merits of the application, and without prejudice to the right of the plaintiff to renew its application for an appeal and for a restraining order, pending the appeal, in the Supreme Court, or as it may be advised.

"'Given this 13th day of September, 1913.'"

"Shelby, Circuit Judge. I concur in the decree refusing to continue the restraining order pending the appeal, but I reach the conclusion from a consideration of the application on its merits. My view would lead to a denial of the application, but not to referring the motion to the Supreme Court. The plaintiff would, of course, be free to make such application to that Court as it chose to make.

"The effect of the injunction, if granted, would have to enjoin the rates fixed by the Commission and to continue in force, pending the suit, the higher rates. The Court, by a majority of the judges, refused the injunction, and, on August 12, 1913, put in force the rates established by the Commission, which rates are now in force. The question of the granting of the injunction was within the judicial discretion of the Court, governed by established equitable principles. In two opinions filed, the Court gave reasons for the exercise of its discre-

tion in refusing the writ. The application now before the Court seeks to enjoin or stay the order of the Commission pending the interlocutory injunction. The first application was for an injunction pending the suit which stood for trial in the District Court; the second application is for an injunctive order pending the appeal. Relief on either application meant the suspension of the rates fixed by the Commission and the re-establishment of the higher rates fixed by the plaintiff. Both applications are urged by the same arguments and the same offer of bond. I can see no reason for granting the second application that would not have been equally applicable to granting the first. To have granted the first would not have delayed a trial on the merits, while to grant the second may have that effect. The real practical question on both applications is whether the Commission's order shall remain in force or be suspended. It is, of course, just as satisfactory to the plaintiff to enjoin it on appeal, with bond, as on the first application, with bond. The delay in enforcing the order, if it is finally enjoined, is likely to be greater by the granting of the stay on the second application than if it had been granted on the first. It seems to me utterly useless to have refused the first application, if the second is to be granted. If a case is now presented for the exercise of judicial discretion by revoking, in effect, our former order, we should have granted the interlocutory injunction on the first application. We gave reasons for the refusal of the injunction which seem to me equally controlling on the second motion. Conceding that the statutes allow a supersedeas after denial of the injunction in cases arising

under Section 266, we have before us practically the same question that we had on the first application—whether or not the Commission's order should be in force pending the litigation. The only difference is that the Commission's order is now fortified by the opinion of this Court. Having refused to enjoin it, and having put it in force on its merits after full hearing, it seems to me that it would be practically a reversal of our position to suspend it now after our elaborate approval of it. I do not lose sight of the fact that the first application was for an interlocutory injunction only, and that the second is also for appeal. **The question of suspending the Commission's order is separate from the claim for appeal.**

"It is argued that, because one of the judges dissented from the decision on the first application, such doubt is created that the second application should be granted. If one thing is made clear by the statute, it is that one judge cannot grant the injunction. If, when the injunction is refused by the Court, composed of three judges, the dissent of one of the judges was permitted to control a second application, and cause an injunction or a continuance of the restraining order, the purpose of the statute would be defeated. One judge could still prevent the enforcement of the rates fixed by a Commission or by a Legislature.

"It is urged that the second application should be granted because the decision of this Court may be reversed. If a majority of the Court now believe we have decided erroneously in refusing the injunction on the first application, the way to correct it here, if we have authority to do so, is to set aside

the order and grant the injunction. That should be done, if at all, directly, and not indirectly. The Supreme Court may, of course, reverse the decision.

"Stress is laid on the plaintiff's offer to give bond to indemnify passengers. The same tender was made on the application for an interlocutory injunction. Where the rights of a defendant may be protected by bond, the Court will often exercise its discretion in favor of granting or continuing an injunction; bond being required of the plaintiff. This is often the case in controversies between individuals involving a sum of money or certain property, or even involving contracts, where the interest involved is certain and the defendant in the suit is the person to be indemnified. The bond in such cases protects the defendant. Here the defendants have no interest in the litigation. The suit is really against the people who travel, or who may travel on the plaintiff's road.

"The reasons which led to the passage of the statutes now forming Section 266 of the Judicial Code are well known, and are part of the judicial and political history of the country, and no comment on them is necessary. The legislation was intended to check and prevent a practice by which one judge, on *ex parte* hearings and affidavits, superseded acts of Legislatures and Commissions indefinitely, on the ground that they were unconstitutional. The purpose of the section should not be disregarded in construing it, or in the exercise of judicial discretion in deciding applications based upon it. The purpose is clearly to restrict the issuance of interlocutory injunctions in a designated class of cases, and to prevent delays in the enforcement of certain statutes or orders of Commissions. The section

authorizes a single judge to receive the application for an interlocutory injunction, but not to grant it. He is required to call to his assistance two other judges "to hear and determine the application." The two other judges are called for no other purpose, and no other duty is imposed on them by the text of the section. The judge to whom the application is made may, to prevent irreparable loss or damage —and only for that purpose—grant a temporary restraining order; but such order is to remain in force 'only until the hearing and determination of the application for an interlocutory injunction.' When the two judges who are called to the assistance of the judge to whom the application is made sit with him, and hear and determine the case, and make an order granting or denying the interlocutory injunction, they have discharged the duty placed upon them by the words of the statute. They have done what they were called to do, and what the statute authorizes them to be called for; that is, to the assistance of the judge to whom the application was made—'to his assistance to hear and determine the application' for an injunction. The section provides that an appeal may be taken to the Supreme Court from the order granting or refusing the injunction, but there is nothing in the section to indicate that the District Judge alone could not grant the appeal. If he alone granted the appeal it would, of course, be without an accompanying order suspending the operation of the disputed rates, **for it cannot be held that it was intended that the one judge could defeat the order of the three judges by granting a stay on appeal which had just been refused by the three judges on the application for injunction.**

But the contention of the plaintiff is that the three judges, or a majority of them, may, after refusing the interlocutory injunction, grant an appeal and continue the restraining order against the rate in question until the appeal is decided. The very question which the section brings the three judges together to hear is whether or not an interlocutory injunction shall be granted. If it is granted, there is no longer any need for the restraining order to prevent the rates going into effect, for the interlocutory injunction would take the place of the restraining order; if it is refused, the restraining order should end, because the statute so provides, and because the refusal is a decision that there should be no injunction and that the rates opposed should go into effect."

ALTERNATIVE MOTION FOR STAY.

Doubtless realizing that the supersedeas granted by the District Judge, in and by which the temporary restraining order was reinstated and continued, should be set aside, the respondent makes the request that your Honorable Court allow:

(a) An order for stay which will preserve the *status quo* pending hearing and determination of this appeal; or

(b) A temporary restraining order, coupled with an order directed to such an inferior tribunal as may be proper, authorizing it to issue such a stay order maintaining the *status quo* pending the hearing and determination of this appeal.

The respondent will doubtless base its application upon the authority of the *Southern Railway Co. v. Watts*, but we submit that such is not a precedent for this case. In the *Southern Railway case* the three judges who signed the order denying the interlocutory injunction, in the very same decree continued the restraining order until application might be made to the Supreme Court for a stay pending the appeal. But in the present case, the three judges who signed the order denied the interlocutory injunction outright. Their decree was one, the effect of which caused the temporary restraining order to cease as of that date. That temporary restraining process fell with the order which refused the injunction, unless the same had been kept in effect by the decree which declined the interlocutory injunction and by the three judges who refused the same.

The temporary restraining order issued by one judge on the 13th day of May, 1922, ceased to exist on the 24th day July, 1922, when three judges refused an injunction. The act of the one District Judge, in attempting to continue it, is the same as if it had never happened. The restraining order which he issued on May 13th was, at that time, lifeless, and nothing which he could do or which he has done changed its status. There is at this time no restraining order upon which the Court can grant a stay, such as there was in the *Southern Railway case*. If three judges had continued in effect the restraining order until your Honorable Court decided whether it should or should not issue a stay, then the respondent might contend for a reference of the matter back to the Court which denied the injunc-

tion, but such does not exist in this case. The three judges have acted. They have determined that no interlocutory injunction shall issue. The restraining order has not existed since the 24th day of July, 1922, because it was not within the power of one District Judge to continue it after three judges had refused the injunction. You, therefore, have a case before you in which, at this time, there is no restraining process whatever, for the action of the District Judge, in that regard, is as null as though the restraining process had been granted by some person without color of office. Where there is no restraining order in existence, there is nothing to suspend and nothing to stay.

The *Watts case* dealt with the collection of taxes, and the jurisprudence in that regard is quite unlike the jurisprudence relating to the collection of rates. In all events, however, when the Court referred the question of granting or refusing a stay to the enlarged District Court, the proceedings were all under a continuance of the restraining order by the same three Judges who denied the interlocutory injunction.

The present case should not be considered in any more favorable light to the respondent by the mere fact that a District Judge dissented from the majority opinion, and if we may go beyond the record, as the respondents have done, we can inform the Court that the District Judge gave us as his reason for dissenting that he saw no harm which might be done by continuing the process through the grant-

ing of an interlocutory injunction, provided ample bond was exacted.

In our opinion, a greater abuse of judicial process has never been asked by any complainant than has been requested in this case. Your Honorable Court will discern that this complainant before the Court, in effect admitted that, on the evidence and statistics supplied to the Commission, it could not sustain the validity of its demand for an increase in rates. Its whole case is an admission that before the State Commission it did not justify its demands for a rate advance, and that, while it yet lacks the data and facts upon which the Court might be justified in setting aside an order of the Commission, that such preliminary surveys and estimates are being made, *ex parte*, as will develop facts bearing upon their values and earnings sufficient to entitle them to a very narrow margin of relief. Its demand is predicated upon the Court disregarding the settled presumption that the orders of a State Commission are *prima facie* presumed to be correct, and the motion now made for an additional stay would likewise have the Court presume such order to be incorrect, regardless of the fact that it is now reinforced by a decision of a Federal Court. We give a brief history of this case that the Court may understand the position which this complainant has taken in this litigation.

HISTORY OF THE CASE.

On the 22nd day of September, 1920, the Cumberland Telephone & Telegraph Company filed an application with

this Commission, (that is to say, with the Railroad Commission of Louisiana, of which this body is the continuing successor), wherein it alleged that as of midnight, July 31, 1920, it had, for a period of 12 months, been in possession, control and had operated its telephone lines within the State of Louisiana, having received them out of the hands of the Federal Government one year prior to that time; that for its fiscal year preceding the filing of the petition for an increase in rates, after allowing for income tax, depreciation, interest, maintenance and other costs of operation, its net earnings amounted to 5.92 per cent upon its investment, during the abnormal year preceding the 31st day of July, 1920. The petition outlined a program of anticipated construction which the concern intended to make between the years 1921 and 1925, and closed with the prayer as follows:

> "**Wherefore,** it is respectfully prayed that this Commission will name an early date upon which this petitioner may appear and present the facts and circumstances of the operation of its property in the State of Louisiana during the twelve calendar months from August 1, 1919, to August 1, 1920, together with the needs of the public and of this Company for relief, and that at such time this Company shall be authorized to charge such rates within the State of Louisiana as will establish the credit of this Company and enable it to secure the necessary money with which to construct the facilities demanded by the public for service, and which will pay to the owners of the property a fair, just and compensatory rate for its use by the public."

The Commmission entered an order requesting the Telephone Compnpany to make its claim more specific by enumerating the e rates it requested at each exchange. After a hearing, on n the 26th day of February, the Commission entered an or order granting the increased rates as requested, all of which ch were over and above the rates as established by the Post stmaster General during the period of Federal control. On One Commissioner dissented.

The rules les of the Commission provided that within 10 judicial day ays, any interested party might apply for a rehearing. W Within the 10 days, various interested parties filed applica ication for rehearing with the Commission. On April 1, 192 1921, the Commission handed down an order reopening the he case, but continuing the increased rates in effect until fu further order of the Commission, and ordering that the Tel Telephone Company should keep its books and records in su such condition that, if on final hearing the increase in rat rates should be refused, that proper refund should be made to t to the subscribers.

No further ther action on the petitions for rehearing was taken in the c he case until May 13, 1922, when, after argument, this Commiss mission entered its order, now being contested, which read a d and provided as follows:

"It i **"It is ordered,** and a rehearing is granted in this case on e on and from the order of the Railroad Commission of n of Louisiana of February 26th, 1921, and on sion of rate allowances made in said order or made in the rat d order of April 1st, 1921, and pending the final said or

hearing and determination of this case, from and after this date, all rate advances allowed on February 26th, 1921, and thereafter, are hereby suspended, and the rates and charges to be made and to be collected by the Cumberland Telephone & Telegraph Company within the State of Louisiana will be such as were in force prior to the 26th day of February, 1921, and at the time this application was filed; and be it further

"**Ordered,** that the various interested parties be given notice that a final hearing of this matter will be held in the City of New Orleans, beginning on the 27th day of June, 1922, at which time all interested parties will be heard.

"BY ORDER OF THE COMMISSION.

"New Orleans, La., May 13th, 1922."

Instead of presenting its records and data at a hearing before the Commission, ordered to take place a little more than one month from the date of the order, the complainant filed its petition in the District Court of the United States, for the Eastern District of Louisiana, in which it alleged that as yet **no physical inventory of its property had been taken, no segregation of the interstate and intrastate business at that time had been made, but that when the same had been made, it would be shown that the order of the Commission reduced its intrastate earnings to an amount which did not allow a sufficient revenue.** The District Judge promptly issued a temporary restraining order. Upon hearing before three judges, by a two to one decision, for a number of reasons, the Court

held that no injunction should issue. The complainants made application to one District Judge and an order of appeal was granted, with supersedeas, continuing the restraining order originally issued.

EARNINGS OF THE DEFENDANT.

The answer filed by the Commission and the State of Louisiana shows that, according to the admitted statistics of the Cumberland Telephone & Telegraph Company, that the value of its property does not exceed $9,400,000.00, and that, according to the admissions made by it in a case pending in the State of Tennessee, the value of the Louisiana property did not exceed $7,500,000.00. The Commission showed that the earnings of the Company in the State of Louisiana, after allowing for proper deductions, were from 15½ per cent to 20 per cent per annum. We respectfully request that your Honorable Court may review the answer of the Commission and its order, wherein are contained abundant admitted facts which show, beyond question, that the earnings of the complainant, so far as the record before the Commission shows, have been far in excess of the admitted 5.92 per cent.

JURISDICTION.

The order issued by the Commission was not a final order; it took from the Telephone Company nothing that it had prior to the time when its application was first filed with the Commission; it amounted to granting a rehearing, in accordance with its rules, and to giving as early hearing as the Telephone Company requested for a final disposi-

tion of the case A motion to dismiss the bill was filed in Dis-
trict Court, ar l while the same has not as yet been passed
upon, the ma] rity opinion is to the effect that the same
should be sus ained. The respondents contend that the
status quo of e rate structure is the advances allowed by
the Commissio in its first order, upon which it has granted
rehearing. B such is not correct, for until the case is
finally settled the basis for the future rates is the level
which obtaine prior to the Commission's interference in
its first order As yet, no rates have been finally fixed by
the Commissi

risprudence of your Honorable Court, and
Under the eral Tribunals, this case ought not to have
the inferior F to final action of the Commission, which
been filed pri at an early date, had not the present suit
would have be
been filed.

Ci *McCord v. Cincinnati, N. O. & T. P. Ry. 183 U. S., 483; 22 Supreme Court, 165; mis v. Lehigh Valley Railroad Co., 243 S., 43, 36 Supreme Court, 228; Wilcox v. solidated Gas Co., 212 U. S., 19; 29 Su- ne Court Reporter, 193.*

he allegations of the complainant, there
According ne between a proper rate and the possible
is but a narro they allege.
confiscation w

Court will note one salient particular as
Your Honor le of the Louisiana Commission, as com-
regards the a

pared with the attitude of the other states in which the respondent operates. The respondent alleges that if the State of Louisiana should refuse its application for rate advance and all other states should grant the same, that its net revenue in the other states would be lower than in the State of Louisiana. And yet, no rate increases have ever been allowed in any of the other states, but pending all abnormal times, the State of Louisiana allowed all the increases requested in the petition now made the basis of the present suit. The liberality of this Commission, according to the respondent, has placed it in a position where its discretion cannot be exercised in the same manner as had it been less liberal in the original instance.

We submit that the opinion rendered by the lower Court does not permit of any serious legal question as to its correctness, and in that opinion, may it please the Court, the majority opinion found it unnecessary to pass upon any question which strengthened the case of the Commission.

It was the intention of the statute that a Commission should be permitted to proceed with its orders and that the Courts would not usurp the functions of the legislative bodies until the case presented one which clearly required judicial interference, so as to prevent the confiscation of property. Just what contention the defendant purports to make to justify the extraordinary demands upon the State of Louisiana, we are at this time unable to anticipate, but we submit that such extraordinary process and unusual consideration has been allowed the respondent in the State

of Louisiana that the functions of the Commission should not be further hampered pending its final decision, but that the judicial knowledge that prices have receded should have considerable weight in determining this case on a hearing such as the present. If, under the prices which prevailed in July, 1920, this respondent earned 5.92 per cent, after allowing all of its claims, and admitting them all to have been just, then no reasonable speculation would be required to justify the Commissions granting of a rehearing. When this respondent admitted itself to be making 5.92 per cent, it alleged a value of approximately $12,000,000.00, although its value was less than $9,000,000.00; it alleged deductions for income tax, which the Courts declined to allow; it claimed as an added value to its property, a reserve fund which it had taken out of earnings during the preceding years, and which this Court has held could not be done; it claimed many items of value upon which it calculated a proper rate, such as working capital, etc. Every controverted feature of its case was based upon facts which it admitted, with only one possible exception, which did not affect the result.

We submit that your Honorable Court should treat this case in the same light as if no temporary restraining order ever issued. If the District Judge had declined to grant any restraining process until a hearing before the three Judges, manifestly there would have been nothing upon which it could be claiming that a supersedeas could issue. But, the mere fact that one of the three judges, pending

an argument before them all, could grant a temporary restraining process, is held to be the basis upon which these respondents now ask that you grant such order as will further make it possible to maintain rate increases granted by the Commission in a case wherein it has issued an order for rehearing.

Respectfully submitted,

HUEY P. LONG,
W. M. BARROW,
Solicitors for the Appellee.

EXHIBIT A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DISTRICT, IN EQUITY.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH CO., Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL., Defendants.

Application for Interlocutory Injunction under Section 266 of the Judicial Code.

Hunt Chipley, E. D. Smith, J. C. Henriques and J. Blanc Monroe, for Plaintiff.

A. V. Coco, Attorney General, Wylie M. Barrow, Asst. Attorney General, Huey P. Long and A. H. Roberts, for Defendants.

Before Bryan, Circuit Judge, and Clayton and Foster, District Judges.

Bryan, Circuit Judge:

The plaintiff, Cumberland Telephone & Telegraph Company, by its bill in equity seeks to enjoin an enforcement of the following order entered by the Louisiana Public Service Commission, May 13, 1922.

"It is ordered, and a rehearing is granted in this case on and from the order of the Railroad Commission of Louisiana of February 26th, 1921, and on the rate allowances made in said order or made in said order of April 1st, 1921, or allowed to be collected in said order of April 1st, 1921, and pending the final hearing and determination of this case, from and after this date, all rate advances allowed on February 26th, 1921, and thereafter, are hereby suspended and the rates and charges to be made and to be collected by the Cumberland Telephone & Telegraph Company within the State of Louisiana will be such as were in force prior to the 26th day of February, 1921, and at the time this application was filed; and be it further

"Ordered, That the various interested parties be given notice that a final hearing of this matter will be held in the City of New Orleans, beginning on the 27th day of June, 1922, at which time all interested parties will be heard."

In September, 1920, the plaintiff applied to the Commission for an increase in telephone exchange rates over those established by the Postmaster General during Federal control. After hearings, and on February 26, 1921, the Commission entered an order granting the increased rates prayed for by the plaintiff.

April 1, 1921, the Commission entered an order somewhat modifying the rates, re-opening its proceedings with reference thereto, and providing for the taking of further testimony. Such was the status of plaintiff's application for increased rates when the Commission issued its order

of May 13, 1922, above set out, granting a rehearing, reinstating the rates put into effect during Federal control, and setting the whole matter down for final hearing on June 27, 1922.

The plaintiff's property was returned to it by the Postmaster General August 1, 1919.

The bill contains the following averments:

That upon its total actual average investment, including both interstate and intrastate exchange and toll business, the plaintiff earned 5.92 per cent net revenue for the year ending July 31, 1920, and at the rate of 3.03 per cent per annum during the months of August, September, October and November, 1920;

That for the year 1921, the plaintiff operated under the rates established by the Postmaster General during the months of January and February, and under the increased rates authorized by the Commission's order of February 26, 1921, during the remaining ten months of that year, and earned a net revenue of 7.15 per cent upon its average investment, including both interstate and intrastate business;

That all of plaintiff's telephone exchange business in Louisiana is intrastate, but that its toll business is partly intrastate and partly interstate;

That approximately 89 per cent of plaintiff's total property is used in exclusively intrastate business, and approximately 11 per cent exclusively in interstate toll business;

That the reasonable value of plaintiff's property in Louisiana devoted to both interstate and intrastate business as of May 13, 1922, the date of filing the bill, was in excess of $15,000,000;

That for the year 1921 the average investment in exchange lines equipment was $7,993,207.60, in toll lines $3,326,013.12, and that plaintiff's total average investment was $12,942,281.61, which included also land, buildings, supplies and working capital. That for the same year the operating revenues were: from exchange service, $3,540,440.51, from toll service $1,553,853.29, and from miscellaneous sources $77,668.33, a total of $5,171,962.13. That the total operating costs were $4,246,635.08, and the net revenue $924,327.85.

That the rates are confiscatory, and if enforced would deprive plaintiff of its property without due process of law.

The averment that plaintiff's total property exceeds $15,000,000 in value is attempted to be supported by an affidavit to that effect, but it appears that the affidavit itself is based upon an estimate. No actual valuation has as yet been made.

In its answer the Commission alleges that the value of plaintiff's entire property in Louisiana is not in excess of $9,324,212.00, which was the value placed upon it by plaintiff for taxation in 1920, and that the property devoted to intrastate exchange service is of less value.

In considering this application, weight should be given to the fact that the Commission has not issued its final order. It had set an early date for a final hearing before application for injunction was made.

The rates fixed by the Commission are presumed to be just and reasonable. The burden is upon the plaintiff to show that they are unjust, unreasonable or confiscatory. *Railroad Commission of Louisiana v. Cumberland Telephone & Telegraph Company, 212 U. S., 414.* If it be assumed that the same rates were unreasonably low in 1920, it does not follow that they would be so at this time. There has been a recession of prices, and current rates upon invested capital are lower now than they were in 1920. And of the facts we may take judicial notice. *Galveston Electric Company v. City of Galveston,* —— *U. S.,* ——, decided April 10, 1922. Under the circumstances, we do not think the fact that the Commission issued an order in February, 1921, increasing rates is sufficient to do away the presumption of reasonableness from the order of 1922, suspending the increased rates, and re-establishing the old rates pending final decision. The rates complained of have not been subjected to a practical test and shown to be unremunerative under present conditions.

The plaintiff is entitled to a fair return upon the value of the property used and useful in conducting its telephone business, *City of Houston v. Southwestern Bell Telephone Company,* —— *U. S.,* ——, decided May 29, 1922.

In order to determine what is a reasonable return it is essential to know the value of the property devoted to the business under consideration. This application for injunction is limited to telephone exchange rates which are alleged to be exclusively intrastate. Of course, there is intrastate toll service also, but no complaint is made as to toll rates. In considering intrastate rates the value of property used in intrastate business should be considered separately, and not in connection with the value of property used in interstate business. *The Minnesota Rate Cases, 230 U. S., 352.*

The estimate of $15,000,000, placed by plaintiff upon the value of its property as a basis for determining the reasonableness of the rates involved includes interstate business. That estimate includes approximately $1,400,000 of capital invested during the year 1922. The additional new capital doubtless produced additional revenue, but how much is not shown or even estimated. The value of the intrastate exchange property and facilities alleged to be devoted to intrastate service is not anywhere shown by the bill or supporting affidavits. The estimate that 89 per cent of the total value of plaintiff's property is devoted to intrastate service, including intrastate toll service, and that 11 per cent is devoted to interstate toll service, is not a satisfactory basis on which to conclude that rates for the intrastate exchange service are confiscatory. But, upon that basis, if there be deducted from the total average investment for 1921 of $12,942,281.61, the investment in toll

lines of $3,326,013.12, and all other investment items be charged to exchange line equipment, the investment value of exchange line equipment for that year could not possibly exceed $8,616,268.48. The operating revenue derived was upward of $3,500,000. No separate or satisfactory showing is made of the operating cost.

The Commission contends that there should be other large deductions from the capital invested and from the operating costs, but it is not considered necessary to pass upon these contentions of the Commission, for the reason that the case as made by the plaintiff does not, in our opinion, sustain a right to the relief sought.

There is no separation of values, revenues, cost of operation, or earnings either as between interstate and intrastate business or as between exchange and toll business.

The plaintiff was put upon notice by the order of April 1, 1921, by which the question of the reasonableness of its rates was reopened for further investigation, that the rates might be reduced again, and that the order of February 26, 1921, was temporary in its nature. The burden, therefore, remained upon the plaintiff, as the moving party, to separate not only its interstate telephone business, but also its intrastate business from its intrastate toll business, and to show by facts, and not by estimates, that the rates attacked were not sufficient to enable it to earn a fair return upon the value of its intrastate exchange business. Before the rates authorized by rate-making bodies are interfered

with by the Courts, Courts, the evidence ought to be clear and convincing that the rat the rates attacked are inadequate.

We are of opini of opinion that the showing thus far made by plaintiff is insuffic insufficient, and the application for interlocutory injunction is, t on is, therefore,

DENIED.

Foster, District Jud ict Judge, dissents.

EXHIBIT B.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DISTRICT, IN EQUITY.

No. 95.

CUMBERLAND TELEPHONE & TELEGRAPH CO.,
Plaintiff,

versus

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
Defendants.

ORDER.

This cause coming on to be heard before the undersigned upon application by complainant for an interlocutory injunction; and upon consideration thereof, Bryan, Circuit Judge, and Clayton, District Judge, being of the opinion that said application should be denied, and Foster, District Judge, being of the opinion that said application should be granted upon proper injunction bond being furnished.

It is, therefore, Ordered, Adjudged and Decreed that said application for interlocutory injunction be and the same hereby is denied.

NATHAN P. BRYAN,
Circuit Judge.
H. D. CLAYTON,
District Judge.
RUFUS E. FOSTER,
District Judge.

Filed July 24, 1922.

FILED
NOV 13 1922
WM. R. STANSB
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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

No. 650.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
Appellant, Respondent,

vs.

LOUISIANA PUBLIC SERVICE COMMISSION ET ALS.,
Appellees, Movers.

Appeal from United States District Court, Eastern District of Louisiana, Baton Rouge Division, in Equity.

BRIEF ON BEHALF OF CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, APPELLANT, AND RESPONDENT ON RULE TO SHOW CAUSE, WHY SUPERSEDEAS AND INJUNCTION SHOULD NOT BE SET ASIDE AND INJUNCTION DISSOLVED.

JAS. C. HENRIQUES,
J. BLANC MONROE,
MONTE M. LEMANN,
Solicitors.

C. M. BRACELEN,
HUNT CHIPLEY,
E. D. SMITH,
Of Counsel.

November, 1922.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

SUBJECT INDEX.

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The supersedeas and stay order here attacked create no new condition. They simply maintain a status and continue a schedule of rates which had been in effect for more than a year prior to the filing of this suit..... 3

The rates maintained by the supersedeas and stay are neither arbitrary nor capricious. They are rates voluntarily installed after hearing by the Louisiana Commission..... 4

If the supersedeas and stay are allowed to stand, no one can or will ultimately be injured no matter what the decision, whereas if they be set aside, respondent will sustain irreparable injury although entirely successful..... 4

The order for supersedeas and stay were entered to prevent irreparable injury..... 4

The order for supersedeas and stay while physically signed only by one of the judges of the three-judge court was by him signed after discussion with his colleagues and with their knowledge and consent and is by him designated as the action of the three-judge court 4

In a case in which irreparable injury will otherwise ensue, the enforcement of an order of a state administrative commission can and should be stayed pending an appeal to this court from a decree of a Three Judge Court denying a preliminary injunction of that order..... 14

In the circuit in which this case originated, it is the practice of the judge in whose district the case arises to sign the order for stay and supersedeas when the three judges declined the preliminary injunction..... 26

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The right of the inferior tribunal to grant supersedeas and stay will scarcely be denied and if that right be conceded and the fact that the supersedeas and stay in this case was signed by Judge Foster, with the knowledge and consent of his colleagues, be borne in mind, the motion to vacate is revealed to be based at best on a mere technicality, and this court will not cause a litigant who has used due diligence irreparable injury on a mere technicality 26

Especially is this so, when the court as in the case of appellee disregarded the technicality and treated appellee's mistaken application for mandamus as a rule to show cause..... 29

Even should the court hold the present stay order ineffectual for any reason, this court will exercise its proper equity powers to maintain a status and prevent irreparable injury pending determination of the appeal 32

When it affirmatively appears that no one will be injured if the stay were maintained and that irreparable injury will result if the stay be dissolved, the stay will be maintained pending the hearing even if the final result is doubtful..... 35

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IN THE

SUPREME COURT OF THE UNITED STATES,

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CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

Appellant, Respondent,

vs.

LOUISIANA PUBLIC SERVICE COMMISSION ET ALS.,

Appellees, Movers.

Appeal from United States District Court, Eastern District of Louisiana, Baton Rouge Division, In Equity.

BRIEF ON BEHALF OF CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, APPELLANT AND RESPONDENT, ON RULE TO SHOW CAUSE WHY SUPERSEDEAS AND INJUNCTION SHOULD NOT BE SET ASIDE AND INJUNCTION DISSOLVED.

Statement.

This case comes up on a motion to show cause issued by this Honorable Court and reading as follows:

SUPREME COURT OF THE UNITED STATES

No..... Original, October Term, 1922.

Ex parte In the matter of HUEY P. LONG, SHELBY TAYLOR and FRANCIS WILLIAMS, constituting the Louisiana Public Service Commission, and the LOUISIANA PUBLIC SERVICE COMMISSION,

Petitioners.

ON MOTION for leave to file petition for a writ of mandamus.

PER CURIAM: The writ of mandamus asked in this motion relates to the granting of a supersedeas by the Judge of the District Court of the United States for the Eastern District of Louisiana in the case of *Cumberland Telephone & Telegraph Company, appellant,* VS. *Louisiana Public Service Commission et al.,* No. 650 on the docket of this Court for the October Term, 1922. The Court considers the application for mandamus as a motion to set aside the supersedeas and injunction granted by the District Judge in the said case of *Cumberland Telephone & Telegraph Company, appellant,* VS. *Louisiana Public Service Commission et al.,* No. 650;

THEREFORE, ON CONSIDERATION WHEREOF, It is now here ordered by this Court that cause be shown by Cumberland Telephone & Telegraph Company, on Mon-

day, November 13th next, or as soon thereafter as counsel can be heard, why the supersedeas and injunction should not be set aside and the injunction dissolved.

October 23, 1922.

This rule was issued in response to an application for mandamus filed as an original proceeding in this Court by the Louisiana Public Service Commission and its members. The avowed purpose of the application for mandamus was to secure an order vacating, annulling and setting aside the supersedeas and stay order pending the determination of the appeal heretofore allowed to the respondent by the lower court.

We wish at the outset to emphasize three facts:

(1) The fact that the supersedeas and stay order here attacked create no new condition. They simply maintain a status by continuing a schedule of rates which had been in effect for more than a year prior to the filing of this suit and which had been put into effect by order of the Louisiana Public Service Commission after hearing.

(2) The fact that the supersedeas and stay order were granted to respondent conditioned upon respondent giving bond for the repayment of the difference between

the rates continued in force thereby and the proposed new rate.

From these two facts, the court will at once see (*a*) that the rates maintained by the supersedeas and stay are not arbitrary or capricious rates, since they were prescribed by the Commission itself after hearing; (*b*) that if the supersedeas and stay are allowed to stand, no one can be injured, no matter which way the case is decided on the merits, since any excess collections made by respondent must be returned under the bond furnished by respondent. *Per contra*, if the supersedeas and stay are set aside and if thereafter respondent is entirely successful in its appeal, it will nevertheless have sustained an irreparable injury since it will be impossible for it to collect from its more than 74,000 subscribers in Louisiana the many thousands of dollars to which it will be entitled.

(3) We wish especially to direct the court's attention to the fact that while the order for supersedeas and stay were signed only by Judge Foster, the record affirmatively shows that that action was taken only after discussion between him and the other two judges of the three-judge court, was taken with their consent and approval, and is designated by him as the action of the three-judge court.

All of this more fully appears from the following detailed, chronological statement of the facts leading up to the present application. They are as follows:

On September 20, 1920, the Cumberland Telephone & Telegraph Company filed with the Railroad Commission

of Louisiana (now the Louisiana Public Service Commission) its application for a state wide increase in exchange rates. The Company was then ready to proceed with the hearing, but the Railroad Commission insisted that hearing on the application should be deferred until December 15, 1920, in order that copies of the proposed increased schedules might be sent to every municipality and every Association of Commerce in the State of Louisiana. This was done.

A full hearing, devoted to taking oral and documentary evidence was had on December 15th, 16th and 17th, 1920, and the Commission continued the case until January 1st, 1921, in order that briefs might be filed by those opposing the application. *No such briefs were filed.*

Thereafter, the City of New Orleans informally asked for a further hearing and for further time, which were granted.

On February 24th, 25th and 26th, 1921, the Commission again had an open hearing in which everyone who so desired was permitted to participate and *on February 26th, 1921, an order was entered by the Commission granting the increases prayed for by the Telephone Company.* The Commission's opinion handed down at that time amply supports its findings and is to be found printed in the present original record in the volume with the printed bill at pages 29, *et seq.* (An earnest effort was made to have this record printed in time for use by the court on this application, but notwithstanding the efficient co-operation of the Clerk of this Honorable Court, time did not permit.)

Thereafter, the City of New Orleans, which had been a party to the prior proceedings, filed what was termed a second application for rehearing and reopening, which application was set down for argument on March 22nd, 1921, and was argued and taken under advisement on that date. On April 1st, 1921, the Railroad Commission of Louisiana handed down its decision, which order (also printed and attached to the printed bill in the record, p. 43) amended its order of February 26th in certain particulars, but left it in the main undisturbed.

The rates provided for in the orders of February 26th and April 1st were immediately put into effect and have continued in full force and effect down to the present day. If the present application to set aside the supersedeas and stay order is successful, this status will be disturbed and these rates reduced to what respondent claims to be a confiscatory basis.

The Commission's order of April 1st, 1921, specifically provided that:

> "The Cumberland Telephone & Telegraph Company * * * so keep its records, books and accounts that should our Order No. 2397 of February 26th, 1921, be modified or cancelled, proper refund may be promptly made to all users of telephone exchange service, of the difference between the rates in effect on February 26th, 1921, and such rates as may be made effective after the hearing and final decision herein."

and this provision of the order has been carefully complied with by the respondent. Moreover, the preliminary restraining order and the order for supersedeas and stay

issued herein al provide that respondent furnish bond for a large sum to secure the performance by it of its obligation to re irn any collections found to be excessive, so that ever if the stay order remains in effect until the final decisio and respondent is unsuccessful, no one will be either njured or seriously inconvenienced, whereas, if the ay is set aside and the rates reduced, respondent will irreparably injured.

Between Apr lst, 1921, and May 2nd, 1922, the opponents of the ra increases took no action before the Louisiana Comn sion, save to obtain continuances from time to time, the st continuance being an indefinite continuance, which med to indicate an abandonment of the contest.

Between the lates, the new Constitution of Louisiana went into ct and the powers and duties of the Railroad Comm on of Louisiana were conferred by that Constitutio pon its successor, the Louisiana Public Service Con sion, which is the defendant in this case. One of th st acts of the Public Service Commission was to ent order continuing in effect the orders previously ente by the Railroad Commission. (This order is likewis ted and is to be found in the original record attached he printed bill at pp. 63 to 68.)

The new C tution provided that the members of the Railroa nmission should *ipso facto* become members of the ic Service Commission, and the personnel therefo mained unchanged. Subsequently, one of the mem ied and a special election was called to elect his su

The new Commissioner, Mr. Williams, prior to his election announced publicly to the voters that if he were elected, he would reduce telephone rates. He circularized every registered voter in the district with postal cards to this effect (see postals, printed bill, pp. 86 and 87). He made no reservation in his promise or pledge.

Immediately upon his induction into office, and notwithstanding the entire inaction of the parties in interest, upon his motion and by his vote and that of the Commissioner who had previously dissented, the Commission on April 28th, 1922, *ex proprio motu* issued to respondent a notice reading as follows (printed bill, p. 90):

> "Notice is hereby given that the Louisiana Public Service Commission will at a session to be held in the Council Chamber of the City Hall, in New Orleans, Louisiana, on Tuesday, May 2nd, 1922, at ten o'clock A. M., take up for hearing and consideration the matter of suspending the rate advances in exchange telephone rates of the Cumberland Telephone & Telegraph Company within the State of Louisiana as authorized in the order of the Louisiana Public Service Commission, pending a decision of the Commission on the application for rehearing granted in said matter. Said hearing to be restricted to argument only and the filing of such affidavits and motions as may be offered, and *no parol testimony will be heard.*
>
> "All interested parties are requested to be present at the hearing."

Respondent appeared at said hearing and attempted to present to the Commission a motion for the recusation of Commissioner Williams on the ground that, having during his campaign for election sent to the voters a postal

card reading in part, "I will reduce telephone rates", and having otherwise expressed himself as determined to reduce telephone rates, he had thereby disqualified himself from sitting as an unbiased and impartial Commissioner for the purpose of passing upon those telephone rates.

The Commission overruled this motion without either reading it themselves or permitting counsel to read it to them. (See Stair's affidavit, p. 8 of printed affidavits in original record.) Respondent thereupon filed a petition setting forth that the hearing and notice thereof were in violation of the rules and regulations of the Commission, and amounted to a denial to it of the equal protection of the law, and deprived it of its property without due process of law, in contravention of the Federal Constitution. This petition was overruled by the Chairman of the Commission and the so-called hearing proceeded.

On May 13th, 1922, the Commission handed down the order herein sought to be enjoined.

As two of the three Commissioners sitting at the so-called hearing of May 2nd, 1922, had indicated in advance that they favored reducing the telephone rates, the decision of May 13th, 1922, was in the nature of a foregone conclusion, and the respondent, therefore, had fully prepared in advance its bill in equity addressed to the United States District Court seeking an injunction restraining the execution of the order then handed down.

That bill invoked the protection of the court upon two jurisdictional grounds:

(1) Diverse citizenship, respondent being a Kentucky corporation and defendants all Louisiana citizens, and

the Louisiana law e[x]pressly giving its citizens redress in the courts against u[n]reasonable rate orders.

(2) A federal q[u]estion arising from the allegation that the order confis[c]ated respondent's property and infringed its rights und[e]r the Fourteenth Amendment.

Honorable Rufus[E]. Foster, United States District Judge for the Easte[r]n District of Louisiana, the district in which the suit wa[s] was filed, required respondent to give a bond in the sum of of $100,000, conditioned to secure the refund by responde[n]t of any rates collected by it and found to be excessive[.] (see bond, original record, p), which reads in part art as follows:

> "The conditio[n] of the foregoing obligation is such that if the said[ ]Cumberland Telephone and Telegraph Company any shall repay to said defendants such damages as they they may suffer and repay to its subscribers in the [t]he State of Louisiana, and to each of them, the excess [c]ess charges collected from each of said subscribers as a as a result of the order entered by the United States D[i]es District Court for the Eastern District of Louisian[a]isiana under date May 13, 1922, over and above what woul[d] would have been collected from said subscribers, and eac[h] each of them, had said order not been rendered, the sai[d] he said repayment to be made as, when and if it shall h[a]all have been finally determined in said cause, that the or[d] the order of the Louisiana Public Service Commission of d[a] of date May 13, 1922, is a legal order binding upon pla[i]on plaintiff therein, then this bond shall be null and void,[ ]d void, otherwise to remain in full force and virtue." ."

Having thereby so ar[r]y so arranged matters that no loss could come to any one, he [t]ne, he issued a restraining order staying

the immediate execution of the Commission's order, and at once called in Circuit Judge N. P. Bryan and District Judge H. D. Clayton.

The Court so constituted heard the application for preliminary injunction at New Orleans on June 23, 1922, and on the next day Judges Bryan and Clayton left that city. On July 24, 1922, Judge Bryan being at that time in Florida and Judge Clayton in Alabama, an opinion and decree were handed down in New Orleans denying the preliminary injunction prayed for by respondent. Thereupon, respondent filed a petition for appeal, supersedeas and stay, alleging that supersedeas and stay were necessary to avoid irreparable injury, and obtained an order for such supersedeas and stay, reading in part as follows:

> "IT IS ORDERED that an appeal be and the same is hereby granted to the Supreme Court of the United States from the judgment and decree aforesaid;
>
> IT IS FURTHER ORDERED that supersedeas be granted to plaintiff as prayed for, upon plaintiff making bond in the sum of One Hundred Thousand ($100,000.00) Dollars, with good and sufficient surety, conditioned that plaintiff in error shall prosecute its appeal to effect and shall answer all damages and costs if it fails to make its plea good. Said bond shall be conditioned also for the repayment to defendants of such damages as they may suffer and for the repayment to plaintiff's subscribers, and to each of them, of the excess charges collected from each of said subscribers as a result of

the issuance and continuance of the preliminary restraining order issued herein over and above what would have been collected from said subscribers had said restraining order not been rendered, the said payment to be made as, when and if it shall have been finally determined herein that the order of the Louisiana Public Service Commission of May 13th, 1922, is a legal order binding upon the plaintiff herein.

"IT IS FURTHER ORDERED that the original restraining order of date May 13th, 1922, be continued in force until this appeal can be determined, the order herein operating as a supersedeas and maintaining the *status quo*.

"IT IS FURTHER ORDERED that the Clerk of the United States District Court for the Eastern District of Louisiana, without delay, make and transmit to the Clerk of the Supreme Court of the United States, a full and true transcript of the proceedings in said cause, including the bill of complaint, the answers filed by the defendants, together with the evidence and affidavits filed herein, the restraining order, the bond thereof, the opinion of the special tribunal denying the injunction, the assignment of errors, the petition of appeal, the order granting the appeal and the bond provided by the order of this Court this 24th day of July, 1922."

While this order was *signed* only by United States Judge Foster, the judge in whose jurisdiction the case had arisen, it was *entered* with the knowledge and consent of the other two judges of the three-judge court, as appears from the following quotation from the opinion

of Judge Foster, copy of which opinion is annexed as an addendum to respondent's return herein:

"Now let us go a little further. Here is a question submitted to three judges, let us say. This is not the action of an individual judge. The question of supersedeas was a matter of discussion among the court composed of Judge Bryan, Judge Clayton and myself, and I showed you, Mr. Long, Judge Bryan's letter in which he says that he thought that the Cumberland Telephone Company would be entitled to a supersedeas in this case, but that was a matter to be taken up by the District Court, by myself.

"Now when I granted an appeal with supersedeas, that is the action of the court, it is merely a matter of practice that I signed the order. Now that supersedeas ought always to be granted to prevent irreparable injury. * * *

"Now then let us see what the result would be. There is no question that if the old rates went into effect, if there was no supersedeas, that the Cumberland Telephone Company would suffer irreparable injury. They could never recover from the subscribers practically or legally the difference between the rates that they would be entitled to charge, if they are right in their application, and the rates that would be put in effect by the order of the Commission. * * *

"Now the case does not touch the toll rates that have been paid in cash. It only affects exchange rates that are collected monthly from rendered bills, and I am quite sure it would be absolutely an abuse of discretion on my part, and entirely unfair and unjust to the litigants if I did not grant supersedeas in this case. Now that question is one which in the judgment of the three judges who sat on this case, is

addressed to the discretion of the District Court, so that I will deny the motion to set aside the supersedeas."

Defendants made application to Judge Foster for an order setting aside the supersedeas and stay. A hearing was had upon this application, and after argument by both sides, Judge Foster denied the application, rendering the opinion, a copy of which is attached to respondent's return herein. This was on July 27, 1922. Defendants took no further action in the matter until they filed the application for mandamus in this court about October 1, 1922. This application for mandamus was by the court turned into the present proceeding.

ARGUMENT.

I. In a case in which irreparable injury will otherwise ensue, the enforcement of an order of a state administrative commission can and should be stayed pending an appeal to this court from a decree of a three-judge court denying a preliminary injunction of that order.

It is neither denied, nor logically deniable, that, if respondent is correct in its contention, it will sustain irreparable injury, unless the order of the Commission is stayed pending the determination of this appeal. Unless the stay is continued in force, respondent must at once begin collecting from its 74,000 subscribers something less than the rate to which it is entitled. The difference between the rate to which it is entitled and the rate which it would thus collect would in the case of each

subscriber amount to a comparatively trifling sum. The total amount lost would, however, amount to many thousands of dollars. If not collected now, this large sum is lost forever—the loss is irreparable. On this subject, Judge Foster's finding was as follows:

> "Now then let us see what the result would be. There is no question that if the old rates went into effect, if there was no supersedeas, that the Cumberland Telephone Company would suffer irreparable injury. They could never recover from the subscribers practically or legally the difference between the rates that they would be entitled to charge, if they are right in their application, and the rates that would be put into effect by the order of the Commission."

On the other hand, if the enforcement of the order is stayed pending appeal and appellant is obligated, as it has been obligated, to return any sums collected by it in excess of the rates ultimately found by the court to be proper, and is required to give a bond for the faithful performance of that obligation, no one can be injured.

Under these circumstances, this court is asked to hold that a stay may not be issued to maintain the status pending an appeal. It is our belief and understanding that this question has recently been answered by this court, and that this court has held that in such a case as this a stay should be ordered pending appeal in order to prevent irreparable injury. We refer to the decision of this court handed down last summer in *Southern Railway Co.* v. *Watts,* No. 927, October Term 1921, in Supreme Court Reporter, Vol. 42, No. 17, pp. 585-586.

In that case, a three-judge court denied an application for a preliminary injunction whereby the authorities of the State of North Carolina were sought to be enjoined from carrying out the provisions of the State tax laws. The plaintiff alleged irreparable injury and sought from the three-judge court a stay pending appeal. This the three-judge court refused on the ground that the stay should be granted (if at all) by this court. The application for such stay was then made to this court, which after considering the matter handed down the following *per curiam*:

> "PER CURIAM. In these cases, which were suits brought under Section 266, Judicial Code, as amended by the Act of March 4, 1913, for a preliminary and permanent injunction, a preliminary injunction was denied by the District Court and a stay granted until an application could be made to this court. As the District Court is familiar with the character of the case, and we are not, we deny the motion for a stay, with leave to apply to the District Court for a stay until the matter can be disposed of here, if in its judgment it deem that such a stay should be granted."

This decision is in line with the leading cases on the subject, which long ago held that there is an inherent power in this court, and in every equity court having jurisdiction, to preserve the status and to prevent irreparable injury pending the final decision of a litigated point. Thus this court, discussing the power of the lower court to maintain the *status quo*, had said in *Hovey* v. *McDonald*, 109 U. S. 161:

> "It was decided that neither a decree for an injunction nor a decree dissolving an injunction was

suspended in its *effect* by the writ of *error*, though all the requisites for a supersedeas were complied with. It was not decided that the court below had no power if the purposes of justice required it, to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary. *This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered;* but it is a discretionary power and its exercise or non-exercise is not an appealable matter. In recognition of this power, and for the purpose of facilitating its proper exercise in certain cases, on appeals from the circuit courts, this court by an additional rule of practice in equity, adopted in October term, 1879, declared that:

'When an appeal from a final decree, in an equity suit granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.' Rule 93."

The court also said at page 182:

"Applying these principles to the present case, it is clear that the force of the decree was not affected by the appeal, although it was in the power of the special term to have continued the injunction and to have retained the fund in its control in the hands of the Receiver had it seen fit to do so. Judging only from what appears in the record, we cannot refrain

from saying that, in this case, *the latter course would have been eminently proper. It would have protected all parties and produced injury to none.*"

So say we here. The maintenance of the supersedeas in this case will protect all parties and produce injury to none, and for that reason if for no other would seem to be eminently proper.

Omaha & C. B. St. Ry. Co. v. *I. C. C.*, 222 U. S. 582:

> "PER CURIAM: Upon the authority of Revised Statutes, § 316; *Ex parte Milwaukee Railroad Co.*, 5 Wall. 188; *Leonard* v. *Ozark Co.*, 115 U. S. 465, 468; *In re Claasen*, 140 U. S. 200, 207; *In re McKenzie*, 180 U. S. 536, 549; *United States* v. *Shipp*, 203 U. S. 563, 573; and upon full consideration of the facts bearing upon the propriety of the appellants' motion for an order to maintain the *status quo* pending this appeal, it is ordered that the enforcement of the order of the Interstate Commerce Commission entered November 27, 1909, and drawn in question in this case, be, and it is, suspended and enjoined during the pendency of this appeal, upon condition that within 10 days herefrom the appellants execute unto the Interstate Commerce Commission and file in this cause a good and sufficient bond in the sum of $10,000, with sureties to be approved by the clerk of this court, and conditioned that the appellants will promptly pay any and all damages which may be suffered by their several passengers and intended passengers by reason of the granting or continuance of this order if it is adjudged ultimately that the order of the Interstate Commerce Commission, drawn in question in this case, is a valid one."

The decision in the *Watts* case, *supra*, shows conclusively that no change in this inherent power of an equity court to maintain the status in order to prevent irreparable injury was made by Article 266 of the Judicial Code as amended. It would have been difficult, indeed, to have held otherwise since that statute expressly recognizes the justice of saving a party from irreparable injury, as appears from the following language:

> "Provided, that if of opinion that *irreparable loss or damage* would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court or any circuit or district judge may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. * * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

This language shows the intent of the law makers to recognize the right of a litigant to a stay when irreparable injury would otherwise result, and the intent to recognize the right to appeal from a refusal of a three-judge court to issue an injunction. Now, it is obvious that if a restraining order were necessary to prevent irreparable injury between the date of the filing of the suit and the date of the hearing by the three-judge court on the appli-

cation for a preliminary injunction, a continuance of that restraining order would likewise be necessary to prevent irreparable injury between the date of the hearing by the three-judge court and the date of the hearing on appeal. If, therefore, the appeal which is expressly granted to the litigant by the statute is to be at all effective, that appeal *must be accompanied by a continuance in force of the restraining order.* Any other construction of the statute would mean an allowance to the litigant of the shadow of an appeal, while the substance was denied to him. If the litigant is granted an appeal, but is permitted to suffer irreparable injury while his appeal is pending, he is really deprived of his appeal entirely, since it will benefit him not at all to win his appeal if meanwhile the injury which he is seeking to avert is permitted to overwhelm him. From which it seems plainly to follow that it was the intent of the law maker that the restraining order to prevent irreparable injury, which the law maker was so careful to allow, should remain in force until the *final* hearing and *final* determination of the application for the interlocutory injunction; and by final hearing and determination we mean the hearing and determination of that application on appeal.

This we take to be the meaning of the decision in the *Watts* case, and this is the construction which the Federal Courts have, practically without exception, placed upon the statute. In case after case, in which the three-judge court has refused the preliminary injunction, the continuance of the restraining order pending appeal has nevertheless been permitted. The cases are as follows:

of *L. & N. R. R. Co.* v. *Siler*, 186 Fed. 176,

In the case court continued the *status quo* pending

the three-judge Court said, beginning on page 203:

the appeal. Th ws that the motion for an interlocutory

"It foll h both its branches must be denied. How-

injunction estions involved are of such importance

ever, the me that a review of our conclusions will

that we ass y complainant, pursuant to the special

be desired r such review found in section 17 of the

provision f 18, 1910. If the Supreme Court on such

act of Jun decide that complainant was entitled to

review, sha on, then it is apparent that our present

this injunc grant the injunction would result in

refusal to injury, on account of failure to preserve

irremediab *quo*. Applying the reasons of the rule

the *status ovey* v. *McDonald*, 109 U. S. 150, 161, 3

stated in I 6, 27 L. Ed. 888, and further stated in

Sup. Ct. 1 *Kansas City Stockyards Co.*, *supra*, 183

Cotting v. 22 Sup. Ct. 30, 46 L. Ed. 82, we have con-

U. S. 79, 80 the restraining order of September 7,

cluded tha be continued until an opportunity has

1910, shou or the complainant to secure a review,

been given to conditions which will be prescribed in

and subject be entered."

the order t

Attention is directed especially to this language of

that court:

"If the Supreme Court on such review, shall de-

cide that co nplainant was entitled to this injunction,

then it is a parent that our present refusal to grant

the injunct on would result in irremediable injury,

on account of failure to preserve the *status quo*."

That language is equally applicable to this case. Should this court decide that respondent is entitled to the preliminary injunction applied for, then the failure to preserve the *status quo* pending that decision would have resulted in irremediable injury to respondent.

In *Ohio River & W. Ry. Co.* v. *Dittey,* 203 Fed. 537, the three-judge court continued in effect the restraining orders until the plaintiffs should have an opportunity to secure a review. The Court said, beginning on page 549:

> "It follows that the motion for an interlocutory injunction in each case must be denied. However, the questions involved are of such importance that we assume that a review of our conclusions will be desired by the plaintiffs, pursuant to the special provision found in Section 266, Judicial Code (Act of March 3), 1911, c. 231, 36 Stat. 1162 (U. S. Comp. St. Supp. 1911, p. 236).
>
> "We have accordingly concluded that the restraining orders heretofore granted shall be continued until an opportunity has been given for the plaintiffs to secure a review, and subject to conditions which will be prescribed in the order to be entered."

In *Grand Trunk Ry. Co.* v. *Michigan Railroad Commission,* 198 Fed. 1009, the three-judge court withheld the formal entry of orders in accordance with its opinion in order to give complainants an opportunity to present application for a continuance of the restraining order pending the appeal. The Court said, on page 1023:

> "It follows from what has been said that the application for interlocutory injunction should be denied, and the existing restraining order vacated.

As the questions presented are important and review may be desired, the formal entry of the orders in accordance with this opinion will be withheld until September 5th, next, to give complainants opportunity to present such applications as they may desire for a continuance of the restraining order pending appeal (under the rule stated in *Hovey* vs. *McDonald*, 109 U. S. 150, 161, 3 Sup. Ct. 136, 27 L. Ed. 888, and *Cotting* vs. *Kansas City Stockyards Co.*, 183 U. S. 79, 80, 22 Sup. Ct. 30, 46 L. Ed. 92) in case such appeal is to be taken."

In *Phœnix Ry. Co. of Arizona* v. *Geary*, 209 Fed. 694, the three-judge court denied the motion for an interlocutory injunction, but the restraining order was continued in force pending the appeal. This action of the three-judge court was tacitly approved by this court in *Phœnix Ry. Co.* v. *Geary*, 239 U. S. 277, in which case the Court said on page 281:

> "The Court held (209 Fed. Rep. 694) that complainant's showing as to the alleged unreasonableness of the Commission's order was not sufficiently strong to warrant an injunction to restrain its enforcement *pendente lite*, but the temporary restraining order was continued in force pending the present appeal, taken direct to this court under the cited section of the code."

We have found no case to the contrary. The diligence of appellee's counsel found no case to the contrary, and their only reliance both here and on the similar motion in the court below is the specially concurring opinion of Judge Shelby in the case of *L. & N.* vs. *Railroad Com-*

5, at page 58. It will be noted that
mission, 208 Fed. 3 concurring opinion, the reasoning of
this was a specially d to by the Court, and that the Court
which *was not agree*:
in that case ordered urt being of opinion that, owing to

> "And the co as to the proper construction of sec-
> the uncertainty Judicial Code, with relation to the
> tion 266 of the e court to restrain the enforcement
> authority of the ding the appeal, and in view of the
> of the order, per f the case, and the pendency of other
> present status o kely to present the same question for
> cases that are lik the importance of a final and author-
> decision, and of t thereof to the public and the liti-
> itative decision cation for a supersedeas and for a
> gants, the appli r would better be presented to the
> restraining orde
> Supreme Court: ore ordered that the plaintiff's ap-
>
> "It is therefe allowance of the appeal and for
> plication for the restraining order against the en-
> supersedeas or order of the Railroad Commission
> forcement of the ding the appeal, be denied, *the court*
> of Alabama, pen *the merits of the application,* and
> *not passing upo* ce to the right of the plaintiff to
> without prejudi ation for an appeal and for a re-
> renew its applic pending the appeal, in the Supreme
> straining order, nay be advised."
> Court, or as it r

If Article 266 of t he Judicial Code as amended means
that the restraining rder may not remain in force until
the final decision on appeal of the question of the right
to a preliminary inju action, then the *Watts* case is wrong,
then all of the other ases quoted are wrong, and then the
inherent right, recog nized in *Hovey* v. *McDonald* and

carefully guarded since, of an equity court to issue stay orders for the purpose of preventing irreparable injury and maintaining the *status quo,* pending the final determination on appeal of a litigated point, has been swept away and litigants are left unprotected and without remedy.

We respectfully submit that the statute means that the restraining order may be maintained in force until the final determination on appeal of the question as to the issuance *vel non* of the preliminary injunction.

II. While the stay order in this case was signed by one judge, that signing was done with the knowledge and consent of the other two judges of the three-judge court.

Appended to respondent's return herein is a copy of the opinion handed down by Judge Foster at the time he overruled the motion made by the appellees in the lower court to set aside the supersedeas and stay order, which supersedeas and stay order were signed by Judge Foster. That opinion contains, among others, the following statements as to the circumstances and conditions upon which the order for the supersedeas and stay were signed by him. He says:

> **"Here is a question submitted to three judges, let us say. This is not the action of an individual judge. The question of supersedeas was a matter of discussion among the court composed of Judge Bryan, Judge Clayton and myself, and I showed you, Mr. Long, Judge Bryan's letter in which he says that he thought**

that the Cumberland Telephone Company would be entitled to a supersedeas in this case, but that was a matter to be taken up by the District Court, by myself."

"Now when I granted an appeal with supersedeas, that is the action of the court, it is merely a matter of practice that I signed the order. Now that supersedeas ought always to be granted to prevent irreparable injury. * * *

"I am quite sure it would be absolutely an abuse of discretion on my part, and entirely unfair and unjust to the litigants if I did not grant supersedeas in this case. Now that question is one which in the judgment of the three judges who sat in this case, is addressed to the discretion of the District Court, so that I will deny the motion to set aside the supersedeas."

These statements speak for themselves. They are, of course, entirely uncontradicted. Judge Foster was simply carrying out the intent of the other judges of the three-judge court when he granted the stay and the supersedeas which are here attacked.

III. In the Circuit in which this case originated, it is the practice for the judge in whose district the case arises to sign the order for stay and supersedeas when the three judges decline the preliminary injunction.

This case arose in the Fifth Circuit. We say that it is the practice in that Circuit for the Judge in whose district the case arose to sign the order for stay and supersedeas when the three judges decline the prelimi-

nary injunction, for the reason that there have recently been three such cases in that Circuit. In each of those cases, the three-judge court was presided over by Circuit Judge Bryan; in each case the preliminary injunction was denied, and in each case a supersedeas and stay were allowed by the order signed by one of the three judges, but entered, as we are advised and believe, with the knowledge and acquiescence of Judge Bryan and the other judge. The first of these cases was that of the *Georgia Railway & Power Co.* and *Atlanta Gas Light Co.,* Appellant, vs. *Railroad Commission of the State of Georgia, et als.,* No. 298, October Term, 1922, of the docket of this court. This was a bill to enjoin the Georgia Railway Commission from enforcing a schedule of rates for gas ordered by it. A temporary restraining order was issued by Judge Sibley (R. p. 24), who then called in Judges Bryan and Jack. The three judges, after hearing, denied the preliminary injunction (R. p. 396), whereupon plaintiff applied for an appeal, supersedeas and stay. By turning to page 403 of the transcript in that case, the Court will find that this order for appeal, the supersedeas and stay were signed by Judge Sibley alone and will find that it reads, in part, as follows:

> "It is further ordered that the original restraining order of date December 31, 1921, and the orders continuing said restraining orders be continued in force until this appeal can be determined, the order herein operating as a supersedeas and maintaining the *status quo.*"

This language was copied *mutatis mutandis* in the case at bar and is the language attacked.

The second case was the case of *Southeastern Express Co.* v. *Stokes V. Robertson, et als.,* No. 528 of the docket of this court, October Term, 1922. This was a bill to enjoin the officials of the State of Mississippi from collecting a privilege tax upon the ground that said tax was unconstitutional. A temporary restraining order was issued by District Judge Holmes (R. p. 14), who called in Circuit Judge Bryan and District Judge Clayton, they being the same Judges Bryan and Clayton who sat in the case at bar. After hearing, the preliminary injunction was refused, but an order was signed by Judge Holmes alone (R. p. 39) granting a supersedeas and stay. This order, as we are informed and believe, was thus signed by Judge Holmes with the knowledge and consent of Judges Bryan and Clayton and reads, in part, as follows:

> "said appeal shall operate as a supersedeas, and shall suspend until the final determination of said appeal the right of defendants to enforce against appellant the statute in question, and to that end it is ordered that the temporary restraining order heretofore granted herein be, and is, restored and extended and shall remain in full force and effect until the determination of said appeal."

The order in the *Georgia* case, *supra,* was signed February 16, 1922; that in the *Southeastern Express* case was signed July 1, 1922; the case at bar was decided below in July, 1922, only a matter of days after the signing of the order in the *Southeastern Express Com-*

pany case. Respondent and the District Court had before them at the time the order was drawn and signed the two precedents in the Fifth Circuit, and also the decision of this court in the *Watts* case, which was handed down May 29, 1922, and published in the Advance Sheets of July, 1922. The language used by this court in the *Watts* case was:

> "As the District Court is familiar with the character of the case, and we are not, we deny the motion for a stay, with leave to apply to the *District Court* for a stay until the matter can be disposed of here, if in its judgment it deem that such a stay should be granted."

Acting on these two direct precedents from the Fifth Circuit and supported, as it believed, by the language of this court in the *Watts* case in referring the application for a stay "to the District Court", the Judge *a quo*, after discussion with his two colleagues and with their consent, signed the order for a supersedeas and a stay here attacked. Surely under such circumstances this court will not set aside that supersedeas and stay and expose this respondent, which has given the bond required of it and has acted with due diligence throughout, to irreparable injury.

A Mere Technicality.

As Judge Foster's action was predicated upon the knowledge and consent of the other two judges of the three-judge court, and as his action followed the rule of practice established by two recent precedents in the Circuit in which he was sitting, his action should, we

submit, be sustained. The objection to it is at most a technicality. We say this because on reason and in view of the precedents cited, we are unable to believe that it will be seriously contended here that there is no power in the inferior tribunal, whether it be the District Court or the Statutory Court, to protect a litigant from irreparable injury pending appeal. Therefore we are driven to the thought that the Movers will contend here that the supersedeas and stay should be set aside for no better reason than that the order was signed by Judge Foster and not by Judges Bryan, Clayton and Foster.

As to the merits of this technical point, we wish to point out that there is very good reason why as a matter of practice the actual signing of the order for an appeal and for a stay should be signed by the Judge of the District in which the case arises and should not require the signatures of the other two judges. In the present instance, when the application for appeal was made, Judge Bryan was many miles away from New Orleans in Florida. Our understanding is that he was en route from Jacksonville to a sea coast town on an automobile trip, it being summer and the Circuit Court of Appeals being on vacation. Judge Clayton was many miles away in another direction in Alabama. Judge Foster was sitting in Louisiana, the place where the litigation had arisen, and the place where the application for the appeal was required to be filed. In order to have obtained the signatures of all three judges, a journey of many hundreds of miles and a loss of several days would have been essential. Meanwhile, the rates sought to be enjoined and actually stayed by the supersedeas and stay order

would possibly have become effective, thereby imposing a loss severe, but none the less irreparable, injury on respondent. It is difficult to believe that the law makers intended that an equity court should impose such hardships of uncertain outcome, loss of time and irreparable injury upon an innocent litigant. Certainly such hardships should not be imposed because of a mere technicality. The light in which this Court views technicalities is plainly indicated in this case in which, appellee having mistaken its remedy and applied for mandamus, the Court disregarded technicality and treated the pleading as a rule to show cause.

We are not arguing here that one judge is allowed to overrule the wishes of his two colleagues. All that the facts of this case require us to argue and all that we are arguing is that in those cases in which it is the desire and intention of the three judges that an appeal with supersedeas and a stay order should be allowed to the respondent, the actual physical signing of such order should be left to the judge in whose jurisdiction the case arises.

The court will, we feel sure, not overlook the fact that in those cases in which appellate proceedings are pursued from the Supreme Court of the States to this tribunal, the stay orders are not signed by all the judges of such State Courts of last resort, but are signed by one judge only. Such cases are not, it is true, wholly analogous, but the fact that in those cases one judge only signs is at least persuasive.

The Alternative Prayer.

For the reasons given above, we believe that this court should decline to set aside the supersedeas and stay order heretofore issued herein, but from a superabundance of caution, we have in our return included formally, but in the alternative, an application to this court for either (*a*) an order for a stay which will preserve the *status quo* pending the hearing and determination of this appeal, or (*b*) a temporary stay order coupled with an order directed to such inferior tribunal as may be proper, authorizing it to issue such a stay order maintaining the *status quo* pending the hearing and determination of this appeal. We have set up this alternative prayer because this court in this case is sitting as an equity court to do equity. Unless a supersedeas and stay are granted to respondent in this case, it will suffer irreparable injury and equity will not be done. Equity can only be done by granting to it such a stay as will shield it from that irreparable injury pending the determination on appeal by this court of its right to a preliminary injunction.

We have quoted *supra* the findings of the Judge *a quo*, who states in unmistakable terms that a failure to obtain such a stay will cause irreparable injury to the respondent, and who further states that:

> "I am quite sure it would be absolutely abuse of discretion on my part, and entirely unfair and unjust to the litigant, if I did not grant supersedeas in this case"

We may therefore take it for granted that such injury will result to respondent if the stay is not granted.

This court has expressly held in the *Watts* case and in the other cases cited, that under such circumstances a stay should be granted. In *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, the Court quoted, with approval, the following language:

> "If on such appeal the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stock yards company would sustain a great and irreparable loss. Under such circumstances, as was said in substance by the Supreme Court in *Hovey* v. *McDonald*, 109 U. S. 150, *it is the right and duty of the trial court to maintain, if possible, the status quo pending an appeal*, if the questions at issue are involved in doubt; and equity rule 93 was enacted in recognition of that right."

In *Hovey* v. *McDonald*, 109 U. S. 161, this Court said:

> "It was not decided that the Court below had no power, if the purposes of justice required it, to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary. *This power undoubtedly exists*, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered."

In *Omaha & C. B. St. Ry. Co.* v. *I. C. C.*, 222 U. S. 582, *this Court exercised its own equity power to grant a stay of the enforcement of a rate order, saying:*

> "PER CURIAM: Upon the authority of Revised Statutes, § 716, *Ex Parte Milwaukee Railroad Co.*,

5 Wall. 188; *Leonard* v. *Ozark Co.*, 115 U. S. 465, 468; *In re Claasen*, 140 U. S. 200, 207; *In re McKenzie*, 180 U. S. 536, 549; *United States* v. *Shipp*, 203 U. S. 563, 573; and upon full consideration of the facts bearing upon the propriety of the appellants' motion for an order to maintain the *status quo* pending this appeal, it is ordered that the enforcement of the order of the Interstate Commerce Commission entered November 27, 1909, and drawn in question in this case, be, and it is, suspended and enjoined during the pendency of this appeal, upon condition that within 10 days herefrom the appellants execute unto the Interstate Commerce Commission and file in this cause a good and sufficient bond in the sum of $10,000, with sureties to be approved by the clerk of this court, and conditioned that the appellants will promptly pay any and all damages which may be suffered by their several passengers and intended passengers by reason of the granting or continuance of this order if it is adjudged ultimately that the order of the Interstate Commerce Commission, drawn in question in this case, is a valid one."

If this be the rule if when irreparable injury would otherwise result *"it is the right and the duty"* of the Court to maintain the status, then the case at bar is a case in which a stay should be granted to respondent. Respondent has throughout used the greatest diligence. Its application for an appeal, supersedeas and stay order was filed on the day the order refusing the preliminary injunction was rendered. The order was conditioned upon the filing by respondent of a bond for a large sum ($100,000) with certain onerous conditions and

bond was filed the same day. The application made by respondent for the stay and supersedeas was granted by the court below. If now this court should hold that the stay should be set aside because the order was signed by one judge instead of by three, we submit that this court should then itself either issue a stay order, which it has the inherent right to issue, or a temporary stay order, and return the case to the inferior court with authority and direction to that court to issue a stay order as was done in the *Watts* case.

Status Quo.

As clearly appears from the statement of facts at the opening of this brief, the effect of the maintenance of the supersedeas and stay order in this case will be merely to maintain and continue a status which had prevailed for more than a year prior to the date of the institution of this suit. The rates kept in effect by this stay order are rates voluntarily placed in effect by the Louisiana Commission. Moreover, as respondent is amply solvent and has given bond to secure the restoration of any excess collections, no one can possibly be hurt by the continuance of the stay order in effect. On the other hand, the setting aside of that order will, if respondent is ultimately successful, cause respondent irreparable injury. *It has frequently been held that the preliminary injunction will be issued in injunction suits even though there may be grave doubt as to the propriety of such issuance.*

As this reasoning is somewhat anal-

ogous here, we call the Court's attention to the following injunction decisions:

City of Louisville, et al. v. *Louisville Home Telephone Company,* decided by the U. S. Circuit Court of Appeals, Sixth Circuit, April 14, 1922:

> "Further, in the ordinary railroad rate case and (in less degree) with reference to a gas company in a great city, it is not practicable to provide anything like complete protection to the rights of the public in case the company finally fails. The items of excess charge are relatively trifling, and the persons who might be entitled to a refund constitute, as to the railroads, a fugitive class and as to the gas company, a largely shifting class. A large share of railroad travelers will in such case permanently lose the excess charges which may turn out to have been improperly paid, and with the gas company the expense of making refunds of trifling amounts, and the constant changes in the body of beneficiaries, make protection by bond substantially defective. With a telephone company in a city of this size such defects in the protection by bond are minimized. The body of rate-payers is relatively permanent, the amounts are large enough to justify the necesary bookkeeping, and the rate-payer has in his own hands a practical aid to collection through deduction from future bills. In this sort of case, when the Court, as a condition of injunction against enforcing the ordinance rates, requires a bond to secure the refunding of any excessive charge that may be finally adjudged, and such a bond is given and its sufficiency is not questioned, another, and, so far as we know, the only remaining general reason for requiring the trial period also disappears. On the

other hand, if an injunction is refused, and the Company finally turns out to be right, its loss is irreparable."

In the case of *Love* v. *Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 322, the Circuit Court of Appeals for the Eight Circuit, through Judge Sandborn, held:

> "If the questions presented in a suit for an injunction are grave and difficult, and the injury to the moving party will be certain, great and irreparable, if the motion for the interlocutory injunction is denied and the final decision is in his favor, while if the decision is otherwise, and the injunction is granted, the inconvenience and loss to the opposing party will be inconsiderable, or probably may be indemnified by a bond, the injunction usually should be granted." (This case was affirmed by the Supreme Court of the United States on an application for certiorari. See 220 U. S. 618, where the case appears as *Charles West, et al.*, vs. *Atchison, T. & S. F. Ry. Co., et al.*)

In the case of *Harriman* v. *Northern Securities Company*, 132 Fed. 465, 475, 476, District Judge Bradford said:

> "The granting or refusal of a preliminary injunction, whether mandatory or preventative, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case. • • • Where, however, the sole object for which the injunction is sought is the preservation of a fund in controversy or the maintenance of the *status quo*, until the question of right between the parties can be decided on a final hearing, the injunction properly may be allowed, although there may be serious

doubt of the u timate success of the complainant. Its allowance n the latter case is a provisional measure, of su pensive effect, and in aid of such relief, if any, s may finally be decreed to the complainant. The views are supported by abundant authorities, to hich, were it not for the importance of the case, I sh uld refrain from adverting."

In the case of *adden* v. *Dooley*, 74 Fed. 429, 431 (C. C. A.) the Circ it Court of Appeals for the Second Circuit, speaking th ough Judge Shipman, said:

"When the estions which naturally arise upon the transaction deliberate exan make them a proper subject for will not result nation, if the stay of proceedings it is proper 'to too great injury to the defendants, until the rights reserve the existing state of things investigated and f the parties can be fairly and fully which have the determined' by evidence and proofs erit of accuracy."

In the case of *y of Newton* v. *Levis*, 79 Fed. 715, 717, 718 (C. C. A.), Eighth Circuit, thr e Circuit Court of Appeals for the gh Judge Sandborn, said:

"The grant or withholding of a preliminary injunction rest in the sound judicial discretion of the Court, and e only question presented by this appeal is whe or not the Court below erred in the exercise of ir discretion. • • • When the questions to b ltimately decided are serious and doubtful, the l discretion of the judge in granting the writ shou be influenced largely by the consideration that e injury to the moving party will be certain, gr and irreparable if the motion is denied, while e inconvenience to the opposing parties will be considerable and may well be in-

demnified by proper bond if the injunction is granted. A preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or fact to be ultimately determined in a suit, are grave and difficult, and injury to the moving party will be immediate, certain and great, if it is denied, while the loss and inconvenience to the opposing party will be comparatively small and insignificant if it is granted."

For all of which reasons, we respectfully submit that the rule herein issued should be denied and the supersedeas and injunction or stay herein issued should be sustained and continued in force, or in the alternative we submit that this Court should either

(*a*) Itself issue an order for a stay which would preserve the *status quo* pending appeal as was done in the Omaha case; or

(*b*) Issue a temporary stay order, coupled with an order directed to such inferior tribunal as may be proper, authorizing it to issue such stay order maintaining the *status quo*, pending appeal, as was done in the *Watts* case.

All of which is respectfully submitted.

JAS. C. HENRIQUES,
J. BLANC MONROE,
MONTE M. LEMANN,
Solicitors.

C. M. BRACKLEN,
HUNT CHIPLEY,
E. D. SMITH,
Of Counsel.

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WM. R. STA

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 650

CUMBERLAND TELEPHONE & TELEGRAPH CO.,
Appellant,

versus

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
Appellees.

Return of Cumberland Telephone & Telegraph Company to Rule to Show Cause Why Supersedeas and Injunction Should Not Be Set Aside and the Injunction Dissolved.

CUMBERLAND TELEPHONE & TELEGRAPH CO.,

By J. C. HENRIQUES,
J. BLANC MONROE,
MONTE M. LEMANN,
Solicitors.

C. M. BRACELEN,
HUNT CHIPLEY,
E. D. SMITH,
Of Counsel.

November, 1922.

André Printery, Inc. 516 Natchez Street.

IN THE

SUPREME COURT OF THE UNITED STATES

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CUMBERLAND TELEPHONE & TELEGRAPH CO.,
Appellant,

versus

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
Appellees.

Return of Cumberland Telephone & Telegraph Company to Rule to Show Cause Why Supersedeas and Injunction Should Not Be Set Aside and the Injunction Dissolved.

To the Supreme Court of the United States:

Now comes the Cumberland Telephone & Telegraph Company, respondent, and for return to the rule to show cause herein, issued by this Honorable Court, says:

I.

That the statute, to-wit, Article 266 of the Federal Judicial Code as amended expressly provides:

> "That if of opinion that irreparable loss or damage would result to the complainant unless a tem-

porary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. * * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing an interlocutory injunction in such case."

II.

That this statute plainly contemplates that a restraining order or stay of proceedings may be issued in those cases in which irreparable injury would otherwise result to the plaintiff and contemplates that such a restraining order or stay shall remain in force until the final determination of the application for the interlocutory injunction. That the statute expressly gives the right to plaintiff to an appeal directly to this Court and that until such appeal has been passed upon by this Court there is no final determination of the application for interlocutory injunction. That unless such appeal is to be wholly ineffectual the restraining order or stay must necessarily remain effective pending such appeal.

That an appeal from the decision of the statutory court of three judges denying an interlocutory injunction has been perfected in this case and is now pending in this Court, and that if said appeal is to be effectual, and if respondent is to

be protected from irreparable injury the preliminary restraining order or stay must continue in effect until the final hearing and determination of said appeal.

III.

That this Court has expressly recognized the necessity of maintaining the *status quo* pending appeal in cases in which irreparable injury would otherwise result and has expressly decided that in a proper case in which a three-judge court has refused a preliminary injunction a stay should be issued by the District Court. *Southern Railway Co. v. Watts*, 42 S. C. R. No. 11, p. 595.

IV.

That unless such a stay is granted to respondent pending the hearing and decision of this appeal irreparable injury will result to respondent. This is manifest, appears from the pleadings and record, and was specifically found by the District Court, as appears from the following:

(a) The District Court found (see attached opinion of Judge Foster on Motion to Set Aside Supersedeas):

> "Now then let us see what the result would be. There is no question but if the old rates went into effect, if there was no supersedeas, that the Cumberland Telephone Company would suffer irreparable injury. They could never recover from the subscribers practically or legally the difference between the rates that they would be entitled to charge if they are right in their application and the rates

that would be put into effect by the order of the Commission."

Ib.:

> "Now the case does not touch the toll rates that have been paid in cash. It only affects exchange rates that are collected monthly from rendered bills and I am quite sure it would be absolute abuse of discretion on my part and entirely unfair and unjust to the litigant if I did not grant *supersedeas* in this case."

(b) The pleadings and record show that plaintiff has approximately 74,000 subscribers paying monthly sums, which sums have been decreased by the order enjoined by amounts which, while individually small, aggregate approximately $45,000 per month, and show that if the order of the Commission is not temporarily restrained pending appeal the collection of these last stated amounts from this large number of persons will be forever lost to the irreparable damage and injury of the respondent, since should respondent prevail on appeal it will nevertheless be unable to collect these amounts.

V.

That the record affirmatively shows that the statutory court of three judges not only recognized the fact that unless a stay pending appeal was granted respondent irreparable injury would result to respondent, but also recognized the propriety of granting to respondent a stay pending such appeal; that it was the opinion of that court that the order granting the *supersedeas* and granting the stay should as

a matter of formal practice be signed by the District Judge in whose district the cause of action had arisen.

That this affirmatively appears from the opinion of the district judge on file herein, a copy of which is appended hereto, and which reads in part as follows:

> "Now let us go a little further. Here is a question submitted to three judges let us say. This is not an action of an individual judge. The question of *supersedeas* was a matter of discussion among the court composed of Judge Bryan, Judge Clayton and myself, and I showed you, Mr. Long, Judge Bryan's letter in which he says that he thought that the Cumberland Telephone Company would be entitled to the *supersedeas* in this case but that was a matter to be taken up by the district court, by myself.
>
> "Now when I granted an appeal with *supersedeas*, that is the action of the court, it is merely a matter of practice that I signed the order. Now that *supersedeas* ought always to be granted to prevent irreparable injury. * * *
>
> "Now the case does not touch the toll rates which have been paid in cash. It only affects exchange rates which are collected monthly from rendered bills and I am quite sure it would be absolute abuse of discretion on my part and entirely unfair and unjust to the litigant if I should not grant *supersedeas* in this case. Now that question is one which in the judgment of the three judges who sat on this case is addressed to the discretion of the district court so I will deny a motion to set aside the *supersedeas*."

VI.

That this case comes up from the fifth circuit and that the precedents in that circuit establish it as a rule of practice that in those cases in which orders for *supersedeas* and stay are sought for the purpose of preserving the *status quo* on appeals from decisions of a three-judge court denying a preliminary injunction the order for *supersedeas* and the stay is to be actually signed, as it was signed in this case, by the district judge in whose district the case arises. Thus in the case of *Southeastern Express Co. v. Stokes V. Robertson, as State Revenue Agent, et al.*, No. 528 of the October term, 1922, of this Court, wherein a three-judge court sat and refused to grant plaintiff a preliminary injunction the district judge entered an order for appeal with *supersedeas* and stay which read in part as follows, p. 40:

> "Said appeal shall operate as a *supersedeas* and shall suspend until the final determination of said appeal the right of defendants to enforce against appellant the statute in question and to that end it is ordered that the temporary restraining order heretofore granted herein be and is restored and extended and shall remain in full force and effect until the determination of said appeal."

And in the case of *Georgia Railway and Power Company and Atlantic Gas Light Company vs. Railroad Commission of the State of Georgia*, No. 298 on the docket of the October term, 1922, of this Court, wherein a three-judge court sat and refused to issue a preliminary injunction, the judge of the district court in whose district the matter had

arisen signed an order for a *supersedeas* and stay, which read in part as follows, p. 403:

> "It is further ordered that the original restraining order of date December 31st, 1921, and the orders continuing said restraining order be continued in force until this appeal can be determined; the order herein operating as a *supersedeas* and maintaining the status."

VII.

That this rule of practice thus established by the precedents in the fifth circuit, which was followed in the case at bar is sustained by the language used by this Court in *Southern Railway v. Watts supra*, which reads:

> "*Per curiam*: In these cases which were brought under Section 266, Judicial Code, as amended by the Act of March 4, 1913, for a preliminary and permanent injunction, preliminary injunction was denied by the District Court and a stay granted until the application could be made to this Court. As the District Court is familiar with the character of the case and we are not we deny the motion for a stay **with leave to apply to the District Court for a stay until the matter can be disposed of here,** if in its judgment it deem that such a stay should be granted." (Black letters by respondent.)

VIII.

That should the court below be in error in following the precedents heretofore established in the fifth circuit and in following its construction of the language used in this Court in the Watts case, then in equity respondent should

be afforded the opportunity to obtain, either from this Court or from such tribunal as this Court may consider the proper tribunal, the stay necessary to allow it to escape irreparable injury.

IX.

That respondent hereby formally but in the alternative makes application to this Court for either

(a) An order for a stay which will preserve the *status quo* pending the hearing and determination of this appeal, or

(b) A temporary stay order coupled with an order directed to such inferior tribunal as may be proper, authorizing it to issue such a stay order maintaining the *status quo* pending the hearing and determination of this appeal.

X.

That copies of this return were mailed to all opposing parties on the 3rd day of November, 1922.

WHEREFORE, Respondent prays that the rule to show cause be dismissed and in the alternative prays for either

(a) An order for a stay which would preserve the *status quo* pending the decision on this appeal, or

(b) A temporary stay order coupled with an order directed to such inferior tribunal as may be proper, author-

izing it to issue such a stay order maintaining the *status quo* pending the hearing and determination of this appeal.

CUMBERLAND TELEPHONE & TELEGRAPH CO.,

By J. C. HENRIQUES,
J. BLANC MONROE,
MONTE M. LEMANN,
Solicitors.

C. M. BRACELEN,
HUNT CHIPLEY,
E. D. SMITH,
Of Counsel.

November, 1922.

ADDENDA.

Opinion of Hon. Rufus E. Foster on motion before him to set aside *supersedeas* and stay:

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA.
(BATON ROUGE DIVISION)

No. 95

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY,

versus

LOUISIANA PUBLIC SERVICE COMMISSION,

OPINION OF THE COURT.

When we get away from the popular aspect of this case, and the political aspect—I mean political in the sense that the State of Louisiana, or any other state, is always offended in its dignity when an order of one of its administrative boards is enjoined—it is a very easy matter to settle this question on legal principles.

There is nothing new in this paragraph of the Judicial Code, saying that a restraining order should only run until the hearing on the case. That has been the equity jurisprudence from time immemorial, and, in fact, under the

equity rules, a restraining order is not supposed to exist for more than ten days, and, if we take the provision of that paragraph, it really extends the power of the restraining order, because it permits it to run until there is a hearing on the case. Congress undoubtedly realizing that these extraordinary three-judge tribunals cannot be gotten together at all times within ten days.

Now Congress certainly never intended, when they granted an appeal to the Supreme Court, that the litigant should have the shadow and not the substance of the appeal, and it never intended that the burdens should be put on the Supreme Court of deciding a mere money judgment. It intended that the Supreme Court should pass upon the great underlying principles of rate making. Now, if this was a money judgment, if we considered this a money judgment in favor of the subscribers, why then the Company would be entitled to a *supersedeas* as a matter of right and not as a matter of discretion in the Court.

Now let us go a little further. Here is a question submitted to three judges, let us say. This is not the action of an individual judge. The question of *supersedeas* was a matter of discussion among the court composed of Judge Bryan, Judge Clayton and myself, and I showed you, Mr. Long, Judge Bryan's letter, in which he says that he thought that the Cumberland Telephone Company would be entitled to a *supersedeas* in this case, but that was a matter to be taken up by the District Court, by myself.

Now, when I granted an appeal with *supersedeas*, that is the action of the Court, it is merely a matter of practice that I signed the order. Now that *supersedeas* ought always to be granted to prevent irreparable injury. The order of the Commission does not establish the fact that the old rates are right or that they are wrong, and the arm of the State of Louisiana is not stayed in any way by this injunction. The Public Service Commission has a perfect right to go ahead tomorrow and have a hearing, to establish what ought to be the correct rates for the Telephone Company to charge, and this injunction does not interfere with that in the slightest. All that this injunction does is to prohibit the reduction of rates already granted by the Public Service Commission until such time as the appeal is heard, or until such time as the Public Service Commission has a hearing on the case and puts in a new schedule of rates. Now the Public Service Commission is not even held up until the Supreme Court has passed on this injunction; if they went ahead tomorrow and fixed new rates, why this whole matter would fall, it would become a moot case. So that there was no occasion for anyone to become very much exercised over this.

Now then, let us see what the result would be. There is no question that if the old rates went into effect, **if there was no *supersedeas*, that the Cumberland Telephone Company would suffer irreparable injury.** They could never recover from the subscribers, practically or legally, the difference between the rates that they would be entitled to charge, if they are right in their application, and the rates that would be put in effect by the order of the Commission.

Now, on the other hand, there is no possible way for subscribers to lose one dollar. They have a bond, and let us concede that that bond may not be sufficient—it probably would not be sufficient—to pay any rebates out of the bond itself, but the Company is perfectly solvent. It contends that it has over $15,000,000 of property in the State of Louisiana, and if we cut that in half—I don't think the contention of the Public Service Commission is that it is below $6,000,000—let us say $6,000,000, certainly the subscribers can recover out of that any overplus that they have paid.

Now it will not be necessary for the subscribers to enter suit. This Court has ample power, when the case is returned to it, as it would have to be returned to it, to order the Cumberland Telephone Company to make these rebates to its subscribers, it would not be necessary for them to come into Court.

Now, further than that, they have been ordered by the Commission, in the original order, to so keep their books that they could make these rebates on a final settlement of the case. I presume that has been done. Even though it was not done by special order, it is a very simple matter to look at the accounts of the subscribers, whether they are charged up with four or five or ten dollars, or whatever the prices may be on exchange rates, and deduct from that the dollar or dollar and a half or whatever the reduction may be eventually.

Now the case does not touch the toll rates that have been paid in cash. It only affects exchange rates that are collected monthly from rendered bills, and I am quite sure it would be absolute abuse of discretion on my part, and entirely unfair and unjust to the litigant, if I did not grant *supersedeas* in this case. Now that question is one which, in the judgment of the three judges who sat on this case, is addressed to the discretion of the District Court. So I will deny the motion to set aside the *supersedeas*.

UNITED STATES OF AMERICA,
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF LOUISIANA,
NEW ORLEANS DIVISION.

CLERK'S OFFICE:

I certify the foregoing to be a true copy from the original record in this office.

WITNESS MY HAND, and the seal of the said Court, at New Orleans, Louisiana, this 25th day of October, A. D., 1922.

H. J. CARTER,
Clerk.

In the Supreme Court of the United States,
October Term, 1922.

Cumberland Telephone and Telegraph Company,
Appellant,
vs.
Louisiana Public Service Commission, et als.,
Appellees.
No. 650

We, the undersigned counsel for Huey P. Long, Shelby Taylor and Francis Williams, constituting the Louisiana Public Service Commission, and the Louisiana Public Service Commission, in the above and foregoing proceeding and in the proceeding in the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, In Equity No. 95, Entitled *Cumberland Telephone and Telegraph Company vs. Louisiana Public Service Commission, et als.*, do hereby certify and acknowledge service upon us as counsel for said parties, of copies of the above return made by the Cumberland Telephone and Telegraph Co. to the rule to show cause, ordered in the above entitled and numbered cause by the Supreme Court of the United States.

In witness whereof, we have hereunto subscribed our names on this.....day of November, 1922.